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In The

Supreme Court of the United States

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS,

Petitioner,

v.

SUSAN AND WILLIAM LAURENDINE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Civil District Court For The Parish Of Orleans, State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

THOMAS P. ANZELMO
Counsel of Record
MCCRANIE, SISTRUNK, ANZELMO, HARDY, MAXWELL & MCDANIEL
3445 N. Causeway Blvd., Suite 800
Metairie, Louisiana 70002
(504) 831-0946

BEN L. MAYEAUX
LABORDE & NEUNER
One Petroleum Center, Suite 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
(337) 237-7000

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Respondents instituted this litigation against the Orleans Levee District ("OLD"), alleging design, construction, and maintenance failures in levees that were breached during Hurricane Katrina. Respondents sought class certification in state district court for all area residents and property owners who were damaged by flooding caused by these levee failures. The wife and two sons of the allotted judge, the Honorable Judge Kern Reese, each filed complaints against OLD in the United States District Court for the Eastern District of Louisiana, alleging that OLD was negligent in various respects for the levee failures, and that the home occupied by Judge and Mrs. Reese, as well as each son's individual home, was flooded as a result thereof. OLD filed a Motion to Recuse Judge Reese, which was re-allotted to Judge Michael Bagneris for hearing. However, Judge Bagneris and his wife similarly filed a complaint against OLD in the United States District Court for the Eastern District of Louisiana, seeking compensation for property damage to their New Orleans home as a result of levee failures during Hurricane Katrina. Therefore, OLD sought Judge Bagneris' recusal from deciding its Motion to Recuse Judge Reese. Nevertheless, Judge Bagneris refused to recuse himself, and denied OLD's Motion to Recuse Judge Reese. The question presented for review is as follows:

> Whether Judge Bagneris' failure to recuse Judge Reese violated the Due Process Clause

QUESTION PRESENTED – Continued

of the United States Constitution, when Judge Reese was directly and substantially impacted by the flooding, and the outcome of this case will have a significant influence over Judge Reese's wife's and sons' cases against OLD.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed below:

Susan Laurendine	Plaintiff
William Laurendine	Plaintiff
Al Lebouef	Plaintiff
Aline Hodges	Plaintiff
Pierre Ascani	Plaintiff
Theresa Harvey	Plaintiff
The Honorable Dale Atkins	Plaintiff
Anita L. Sarrat	Plaintiff
The Board of Commissioners for the Orleans Levee Board	Defendant
Louisiana Department of Transportation and Development	Defendant
Sewerage and Water Board of New Orleans	Defendant
State of Louisiana	Defendant

RULE 29.6 STATEMENT

Petitioner, the Board of Commissioners of the Orleans Levee District, is the former governing authority of the Orleans Levee District, a political subdivision of the State of Louisiana.

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The unpublished Judgment and Reasons for Judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, issued on May 23, 2008, denying petitioner's Motion to Recuse Judges Kern Reese and Michael Bagneris, is attached as Appendix (hereafter "App.") at 1.

The unpublished order of the Louisiana Fourth Circuit Court of Appeal, issued on July 28, 2008, denying the petition for writ of certiorari to review the ruling of the Civil District Court for the Parish of Orleans which denied petitioner's Motion to Recuse Judge Kern Reese, is attached at App. 9. The unpublished order of the Louisiana Fourth Circuit Court of Appeal, issued on July 28, 2008, denying the petition for writ of certiorari to review the ruling of the Civil District Court for the Parish of Orleans, denying petitioner's Motion to Recuse Judge Michael Bagneris from hearing the Motion to Recuse Judge Reese, is attached at App. 19.

The unpublished order of the Louisiana Supreme Court, issued on November 10, 2008, denying the petition for writ of certiorari to review the ruling of the Civil District Court for the Parish of Orleans, denying petitioner's Motion to Recuse Judge Kern Reese, is attached at App. 21. The unpublished order of the Louisiana Supreme Court, issued on November 10, 2008, denying the petition for writ of certiorari to review the ruling of the Civil District Court for the Parish of Orleans, denying petitioner's Motion to

Recuse Judge Michael Bagneris from hearing the Motion to Recuse Judge Reese, is attached at App. 23.

STATEMENT OF JURISDICTION

The Louisiana Supreme Court denied OLD's petition for writ of certiorari on November 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case implicates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides in relevant part as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

On September 24, 2005, plaintiffs instituted a putative class action lawsuit against OLD, seeking damages that resulted from flooding related to Hurricane Katrina. App. 214. In their original "Claim for

Damages," plaintiffs alleged that OLD was negligent in:

> a. Designing and installing concrete flood walls which were below standard and potentially unstable in a flood;
>
> b. Failing to test the flood walls for their ability to withstand cascades of lake water that may push over levees during a hurricane; and
>
> c. Failing to interlock the flood walls and/or place a top railing or similar system to bind the walls together.

App. 216. Plaintiffs further averred that "the number of business and property owners affected by the negligence of the defendant are too numerous to mention," and thus, sought class certification for "all residents, business owners, and occupants of the affected areas." App. 217.

By a First Supplemental and Amending Petition, plaintiffs re-designated the named plaintiffs and added additional theories of negligence against OLD, including:

> d. Failing to inspect and maintain the levees after their completion; and
>
> e. Failing to insure that the proper soil was used in the construction of the levee.

App. 221. The putative class was also expanded to include "all residents (sic) domiciliary (sic) and property owners of the Parishes of Orleans and Jefferson" "who were affected by the flooding caused by the failure of the hurricane protection levees and flood wall (sic) in New Orleans." App. 222.

By a Second Supplemental and Amending Petition, plaintiffs named additional defendants, and modified the allegations of negligence against OLD. App. 233. The putative class was then redefined as:

> All residents, domiciliaries, property owners and business owners of the parishes of Orleans and Jefferson in the State of Louisiana whose persons, properties or businesses were damaged by flooding caused by the failure of the 17th Street Canal and London Avenue Canal hurricane protection levees and floodwalls in New Orleans, Louisiana on or after August 29, 2005, who may suffer such injury or damage in the future as a result thereof or who have sustained a justifiable fear of sustaining such injury or damage in the future as a result thereof.

App. 234-235.

Due to the immense devastation caused by Hurricane Katrina, OLD filed a Motion to Recuse all judges of the Civil District Court for the Parish of Orleans as putative class members on August 30, 2006, and requested that the Louisiana Supreme Court appoint an *ad hoc* judge to preside over this matter. On October 26, 2006, the Honorable Kern

Reese, to whom this matter was originally allotted, executed an Order to Re-Allot, in which Judge Reese declined to recuse himself, and requested that OLD's Motion to Recuse be re-allotted to another division for hearing. This matter was re-allotted twice more after OLD filed individual Motions to Recuse Judge Piper Griffin and Judge Robin Giarrusso. Upon Judge Giarrusso's order that the Clerk of Court, the Honorable Dale Atkins, re-allot this matter for recusal only, the request for recusal was allotted to Judge Michael Bagneris.

On February 15, 2007, OLD filed an individual Motion to Recuse Judge Michael Bagneris from hearing the Motion to Recuse Judge Reese. On April 30, 2007, Judge Bagneris denied the Motion to Recuse Judge Bagneris, but did not rule on the Motion to Recuse Judge Reese. OLD filed an application for supervisory writs with the Louisiana Fourth Circuit Court of Appeal, which was denied on June 25, 2007. OLD filed an application for supervisory writs with the Louisiana Supreme Court which was denied on October 12, 2007.

On August 29, 2007, after OLD's writ application had been filed with the Louisiana Supreme Court, Judge Reese's wife, Dorothy Reese, and his sons, Justin and Jared Reese, filed lawsuits against OLD in the United States District Court for the Eastern District of Louisiana for damages resulting from levee

failures related to Hurricane Katrina.[1] In her lawsuit, Dorothy Reese, Judge Reese's wife, seeks compensation for damages to the property at the home she shared with Judge Kern Reese.[2] The lawsuits of Justin and Jared Reese seek compensation for damages to their respective homes.

The negligence allegations in the Dorothy Reese lawsuit against OLD include, but are not limited to: deficiency in design and construction of the 17th Street Canal's levees and floodwalls, (¶ 90), negligently failing to install floodgates at the 17th Street Canal (¶ 91), inadequate design and building of the levee and floodwall system on the 17th Street Canal (¶ 91), negligent design and construction of I-walls extending eleven feet above ground, disregarding reports of weakened soil conditions (¶ 92), and failing to maintain and inspect properly the 17th Street

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[1] *Dorothy Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-4999; *Justin Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-5148; and *Jared Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-5150. Mrs. Reese's Complaint is attached at App. 238.

[2] *See* Act of Cash Sale dated September 14, 2005, attached at App. 290, whereby Judge Reese and Dorothy Reese purchased property in Baton Rouge, Louisiana. The buyers are listed as "Kern A. Reese and Dorothy F. Reese, both persons of the full age of majority, married to and living together."

Canal levee/floodwall (¶ 93). The negligence allegations include knowledge or constructive knowledge of the OLD regarding alleged design and construction deficiencies in light of the soil and the height and instability of the I-walls (¶ 90). Damages alleged are those resulting from the levee failures that occurred during, or as a result of, Hurricane Katrina.

The allegations of the *Dorothy Reese* federal complaint, although expanded and more comprehensive, are essentially identical to those alleged in the suit below, and the damages sought are those resulting from hurricane and flood effects, as in this case. Although Judge Reese is not a named party in the federal suits, his wife's complaint evidences Judge Reese's interest in the cause and its outcome. This interest in the cause and its outcome reflects Judge Reese's apparent bias or prejudice against OLD in the present matter, because it relates to damages to his place of residence at the time of the storm. *See* App. 72, 88, Transcript of May 21, 2008 hearing before Judge Bagneris. His interest in the outcome of this matter is inextricable, as a finding of liability against OLD would undoubtedly influence the outcome of each of the Reeses' federal court actions.

Additionally, after denying OLD's Motion to Recuse himself, and after OLD's writ application had been filed with the Louisiana Supreme Court, Judge Bagneris and his wife, Madlyn, filed a complaint against OLD in the United States District Court for

the Eastern District of Louisiana,[3] seeking compensation for property damage to their home in New Orleans. This complaint provided new evidence supporting OLD's contention that Judge Bagneris should be recused from any involvement in this matter.

Judge Bagneris' negligence allegations against OLD include, but are not limited to: deficiency in design and construction of the 17th Street Canal's levees and floodwalls, (¶ 115), negligently failing to install floodgates at the 17th Street Canal (¶ 116), inadequate design and building of the levee and floodwall system on the 17th Street Canal (¶ 116), negligent design and construction of I-walls extending eleven feet above ground, disregarding reports of weakened soil conditions (¶ 117), and failing to maintain and inspect properly the 17th Street Canal levee/floodwall (¶ 118). The negligence allegations include knowledge or constructive knowledge of the OLD regarding alleged design and construction deficiencies in light of the soil and the height and instability of the I-walls (¶ 115). Damages alleged are those resulting from the levee failures that occurred during, or as a result of, Hurricane Katrina.

Like the *Reese* lawsuits, the allegations of Judge Bagneris' federal complaint are essentially identical

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[3] *See* App. 294, Civil Action No. 07-5378 entitled "*Michael G. and Madlyn P. Bagneris vs. United States of America, Board of Commissioners of the Orleans Levee District, et al.*"

to those alleged in the present matter, and the damages sought are those resulting from hurricane and flood effects, as in the case at bar. This complaint evidences Judge Bagneris' belief that OLD was negligent, and liable for the levee failures during Hurricane Katrina. This apparent pre-judgment of the facts and pre-determination of liability against OLD reflects Judge Bagneris' apparent bias in the present matter. It also reveals his inextricable interest in the outcome of this matter, since a finding by Judge Reese that OLD was liable would be likely to influence the outcome of the federal court action. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

Accordingly, in light of the *Reese* and *Bagneris* lawsuits, on May 19, 2008, OLD filed a new Motion to Recuse in which it asked Judge Bagneris to recuse himself from hearing the Motion to Recuse Judge Reese, and re-urged the recusal of Judge Reese. App. 25. In its Motion to Recuse, which is the subject of the instant Petition for Writ of Certiorari, OLD raised the federal constitutional issues at stake here, arguing:

> Defendant submits that both Your Honor and Judge Reese have a pecuniary interest in this litigation and have prejudged the facts in this case such that failure to recuse would violate defendant's Due Process rights, enumerated in the Fourteenth Amendment to the U.S. Constitution, which guarantees to all litigants the right to a fair trial and an impartial tribunal.

See App. 25-26. *See also* App. 35-43, 46-50. OLD's Motion to Recuse was heard before Judge Bagneris on May 21, 2008, and the Fourteenth Amendment due process objection was urged at the hearing as well. *See* App. 58-60, 66.

On May 23, 2008, Judge Bagneris denied OLD's Motion to Recuse as to both himself and Judge Reese. App. 1. Judge Bagneris issued Reasons for Judgment in which he failed to address OLD's federal due process argument, but rather found that the Louisiana Code of Civil Procedure did not mandate recusal under the circumstances of this case.[4] App. 3.

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[4] The Louisiana Code of Civil Procedure provides a mechanism for recusal in instances when a judge is unable to fairly and impartially preside over certain matters. La. Code Civ. Proc. art. 151(B)(5) as in effect at the time of the hearing provided that a judge "may be recused" when he is "biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings." In the 2008 Regular Session, the Louisiana Legislature subsequently amended La. Code Civ. Proc. art. 151 to provide that a judge of any court ***shall*** be recused when he is biased, prejudiced, or interested in the cause or its outcome or a party to such an extent that he would be unable to conduct fair and impartial proceedings. *See* La. Code Civ. Proc. art. 151, as amended by Act 2008, No. 663. The revised provision comports more closely with Fourteenth Amendment due process requirements and should have been applied on appeal. *See Reichert v. State, Dept. of Transp. and Development*, 694 So.2d 193 (La. 1997); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696 (1974). However, Judge Bagneris found recusal unnecessary under the earlier, arguably unconstitutional, standard.

OLD then filed writ applications in the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court, again strenuously arguing that its right to due process guaranteed under the United States Constitution's Fourteenth Amendment was violated by Judge Bagneris' refusal to recuse himself and Judge Reese from this matter. *See* App. 100, 127, 153, 183. Nevertheless, both courts denied OLD's writ applications without addressing the Fourteenth Amendment argument. App. 9, 19, 21, 23.

Subsequently, the Sewerage and Water Board of New Orleans, another defendant in this matter, filed a separate Motion to Recuse Judge Reese based on the newly amended Louisiana Code of Civil Procedure article 151, which was heard before Judge Robin M. Giarrusso on December 5, 2008. On January 13, 2009, Judge Giarrusso granted the motion, and ordered the case re-allotted, opining that Judge Reese must be recused as he and his family members are putative class members to this litigation. *See* App. 367, 368. Judge Giarrusso's order temporarily made the instant petition moot; however, shortly thereafter, on February 2, 2009, Respondents filed a Notice of Intent to Apply for Supervisory Writs in the Louisiana Fourth Circuit Court of Appeal regarding the ruling, which is presently pending. *See* App. 369-372.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees to all litigants the right to a fair trial and an impartial tribunal. This right was jurisprudentially recognized by this Court in 1955, in *In Re Murchison*, as follows:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

349 U.S. 133, 136 (1955). Thus, this Court held that even the presence of a possible temptation to the average person as a judge to tilt the balance in favor of one party presents a risk of actual unfairness, and results in a denial of due process of law. *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

OLD submits that both Judge Reese and Judge Bagneris are putative members of the class herein.[5]

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[5] Judge Reese even recognized this interest when he recently recused himself in a related matter, on the grounds that he lives in the "defined footprint" of the action. Judge Reese noted that "living in the defined footprint of this action could make me a putative class member." *See* Order of Recusal, *Rodriguez, et al. v. Sewerage and Water Board of New Orleans,*

(Continued on following page)

Moreover, both jurists have a direct financial stake in this matter, which would present a possible temptation to the average person as decision-maker to make him partisan. The pending *Dorothy Reese* lawsuit against OLD for hurricane damage to the former Reese home demonstrates the risk of Judge Reese's actual bias and prejudice against OLD, and his interest in this cause and its outcome. Likewise, Judge Bagneris' suit against OLD for levee failures in Hurricane Katrina demonstrates that he clearly occupies two inconsistent positions, one partisan and the other judicial. The pendency of these federal lawsuits against OLD necessarily denies OLD due process should Judge Bagneris or Judge Reese be allowed to preside over this case, or to decide any issue concerning this case.

I. The Pendency of the *Reese* and *Bagneris* Lawsuits Demonstrate an Actual Pecuniary Interest in the Outcome of This Cause, Warranting Recusal Pursuant to the Due Process Clause of the Fourteenth Amendment.

In determining whether recusal is warranted under the Due Process Clause, this Court has noted that a judge's interest in a case "cannot be defined with precision. Circumstances and relationships must be considered." *In Re Murchison*, 349 U.S. at 136. The

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et al., Civil District Court Docket No. 06-9763, attached at App. 365.

circumstances presented by the present case go beyond mere allegations of bias and prejudice or the appearance of impropriety. "'[I]t certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22 (1986) (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)). Moreover, this Court has made it clear that recusal based on a due process violation does not require a showing of actual bias. "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."'" *Id.* at 825 (quoting *In Re Murchison*, 349 U.S. at 136).

Indeed, this Court has considered and ruled on the precise due process issue at stake here – whether a judge may preside over a case presenting the same legal issues as a separate case in which the judge has a personal financial interest – and held it constitutionally impermissible. In *Aetna Life Ins. Co. v. Lavoie*, this Court determined that an Alabama Supreme Court Justice could not participate in a decision of the court regarding penalties against an insurer for bad-faith failure to pay claims, because the Justice had a pending lawsuit against a different insurer alleging bad faith which could be affected by

the outcome of the case over which he would preside. This Court reasoned:

> We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey, Murchison,* and *Ward.* We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"

475 U.S. at 825 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (quoting *Tumey*, 273 U.S. at 532)). Thus, the mere temptation to Justice Embry to rule against the insurer, because of his personal financial stake in the determination of the underlying legal issues, was sufficient to deprive the insurer of its due process rights.

Like Justice Embry's predicament in *Aetna*, Judge Reese's interest in the outcome of the present matter is demonstrated as follows: (1) Judge Reese's wife and children have lawsuits pending in federal court against OLD due to flood damages; (2) a finding of liability against OLD in this litigation could influence the value of the Reeses' federal lawsuits; (3) a judgment or ruling adverse to the interests of OLD in this litigation would influence the outcome of the federal litigation by creating collateral estoppel issues; and (4) their federal complaints allege violations of

Louisiana state law which, pursuant to the *Erie* doctrine, must control the outcome of their federal cases. Thus, the determination of the state law issues in the present case would create precedent for determination of the state law issues in the federal lawsuits.

As a result, allowing Judge Reese to preside over this matter violates the Due Process Clause of the Fourteenth Amendment because he has a direct, personal, substantial, pecuniary interest in the outcome of this case. Any ruling by Judge Reese on issues adverse to OLD in this matter potentially inures to his personal advantage since the outcome of this case could influence the *Reese* federal lawsuit. An advantage a judge, his spouse or children may obtain from a result in a related proceeding should not be gained from a suit over which that judge presides. "An interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding." *Aetna*, 475 U.S. at 830 (Brennan, J., concurring).

The evidence presented proves that Judge Reese has a sufficiently direct and substantial interest in the outcome of this case. By failing to recuse Judge Reese, the trial court's ruling allows Judge Reese to potentially advance his personal interests and the interests of his family, because Judge Reese's rulings in this case could influence the outcome of the federal lawsuits. Accordingly, Judge Bagneris' denial of OLD's Motion to Recuse Judge Reese conflicts with

this Court's precedent, which warrants this Court to grant this writ application under Supreme Court Rule 10(c).

Likewise, Judge Bagneris' conflict in presiding over the Motion to Recuse himself is demonstrated as follows: (1) Judge Bagneris and his wife have a pending lawsuit in federal court against OLD for flood damages to their home; (2) a finding of liability against OLD could influence the value of the *Bagneris* federal lawsuit; (3) a judgment or ruling adverse to the interests of OLD in this litigation could influence the outcome of the *Bagneris* federal suit by creating collateral estoppel issues; and (4) the federal complaint alleges violations of Louisiana state law which, pursuant to the *Erie* doctrine, must control the outcome of the federal case. Thus, the determination of the state law issues in the present case would create precedent for determination of the state law issues in the federal lawsuits.

Allowing Judge Bagneris to preside over his own recusal motion violates the Due Process Clause of the Fourteenth Amendment because he has a direct, personal, substantial, pecuniary interest in the outcome of this case as a putative class member. By failing to recuse himself, and further declining to recuse Judge Reese, with knowledge of the fact that Judge Reese's wife and sons have pending lawsuits against OLD, Judge Bagneris' interests in his own lawsuit are potentially advanced.

II. The Allegations of the *Reese* and *Bagneris* Lawsuits Demonstrate Bias Against OLD Warranting Recusal Pursuant to the Due Process Clause of the Fourteenth Amendment.

This Court's jurisprudence provides that recusation of a judge is required in cases of actual bias or prejudice, as demonstrated by a prejudgment of the facts. *Gibson v. Berryhill*, 411 U.S. 564 (1973). In *Gibson v. Berryhill*, this Court considered under what circumstances bias rose to such a level as to prohibit an administrative board from constitutionally presiding over a license revocation hearing. In *Gibson*, the Alabama Optometry Board ("Board") sought to revoke the licenses of several optometrists working for Lee Optical for the "unlawful practice" of optometry, in violation of Alabama law. Shortly after the administrative charges were brought before the Board, the Board filed a lawsuit against Lee Optical, seeking to enjoin the company from the "unlawful practice of optometry." The state trial court granted the Board's injunction, prohibiting the corporation from employing the optometrists.

The Board then resumed the administrative proceeding against the optometrists, seeking to revoke their licenses. In response, the optometrists filed a lawsuit in federal court, alleging civil rights violations, and seeking an injunction preventing the Board from hearing the pending charges. Because the

Board was composed only of independent optometrists who were not employed by others, the optometrists employed by Lee Optical alleged that the "Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law." *Id.* at 570.

The district court found the Board impermissibly biased and disqualified the Board from presiding over the de-licensing proceedings for two reasons: (1) the Board had filed substantially identical charges against the optometrists in state court, evidencing the Board's pre-judgment of the facts, and (2) the revocation of the licenses of optometrists employed by corporations such as Lee Optical, who held one-half of the business in the State, "would possibly redound to the personal benefit of members of the Board." *Id.* at 578. This Court affirmed the District Court, opining: "It is sufficiently clear from cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Id.* at 579 (citing *Tumey*, 273 U.S. 510 and *Ward*, 409 U.S. 57).

The rationale employed by this Court in *Gibson* is decisive here. The *Dorothy Reese* lawsuit against OLD seeks compensation for flood damages to the home of Judge and Mrs. Reese. The lawsuit alleges that OLD was negligent, and that OLD's negligence caused or led to the levee failures, which resulted in the flooding of the Reeses' home. The allegations in the *Dorothy Reese* lawsuit are nearly identical to the

plaintiffs' allegations in this case, vividly illustrating that Judge Reese has likely pre-judged the facts of this case and possesses an actual bias and prejudice against OLD. Although Judge Reese is not listed as a party in the lawsuit, he testified that he was a resident of the home at the time of the loss, and that he suffered damages as a result of the loss. *See* App. 72, 88-89, Transcript of May 21, 2008 hearing before Judge Bagneris. Thus, the *Dorothy Reese* lawsuit reflects Judge Reese's belief that OLD was negligent, and should be held liable for damages resulting from the flood.

In addition, as affirmed by this Court in *Gibson*, even the *possibility* of an adjudicator financially benefiting from the outcome of a case under his consideration renders that jurist constitutionally unfit. 411 U.S. at 579. Considering this evidence, allowing Judge Reese to preside and rule on the merits of the instant case directly implicates petitioner's due process right to a fair tribunal under our system of law that "has always endeavored to prevent even the probability of unfairness." *In Re Murchison*, 349 U.S. at 136. Consequently, Judge Bagneris' failure to recuse Judge Reese from this matter denies OLD's due process right to a fair and impartial tribunal, and warrants this Court to grant this writ application.

Likewise, in his federal court lawsuit, Judge Bagneris alleges that OLD was negligent, and that OLD's negligence caused or led to the levee failures that resulted in the flooding of his home. The assertion that Judge Bagneris has pre-judged the facts of

this case cannot be disputed, because his claims are essentially the sum and substance of the claims made by the plaintiffs in this matter. The allegations of Judge Bagneris' lawsuit provide clear evidence of his belief that OLD was negligent and should be held liable for damages resulting from the flood.

Thus, the allegations of Judge Bagneris' lawsuit demonstrate his bias and interest in the outcome of the matter in which the Motion to Recuse Judge Reese is pending. In failing to recuse himself, or re-allot the Motion to Recuse Judge Reese, Judge Bagneris effectively exercised his judgment over a matter in which he has an actual interest, by single-handedly selecting the tribunal over a case whose outcome will significantly impact his own lawsuit. As recognized by this Court in *Ward*, the requirements of due process must be met at every stage of the proceedings, and an initial due process violation cannot later be rectified by offering an impartial tribunal:

> Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

409 U.S. at 61-62. Consequently, Judge Bagneris erred in his refusal to recuse Judge Reese, which requires that this writ application be granted by this Honorable Court.

CONCLUSION

The Due Process Clause of the Fourteenth Amendment to the United States Constitution guarantees to every litigant the right to a fair trial and impartial tribunal. Judge Bagneris and Judge Reese's family have filed lawsuits in federal court against OLD, with allegations essentially identical to those made by the plaintiffs against OLD in this matter, demonstrating an impermissible prejudgment of the facts. This apparent bias, coupled with the potential pecuniary affect of the outcome of this case upon the pending federal lawsuits, "would offer a possible temptation to lead him not to hold the balance nice, clear and true."[6] Accordingly, Judge Bagneris' denial of the Motion to Recuse Judge Reese violated the Due Process Clause of the Fourteenth Amendment. The petitioner's arguments are not a personal attack on either judge; however, the apparent bias and personal interest of both judges is too great, despite their statements and belief that neither is biased or prejudiced regarding this matter.

For these reasons, petitioner, The Board of Commissioners of the Orleans Levee District, respectfully requests that this Honorable Court exercise its supervisory jurisdiction by granting this writ application, and REVERSE the trial court's May 23, 2008

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[6] *Aetna*, 475 U.S. at 825 (emphasis added), (quoting *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 532)).

Judgment denying petitioner's Motion to Recuse Judge Kern A. Reese.

Respectfully submitted,

THOMAS P. ANZELMO
Counsel of Record
MCCRANIE, SISTRUNK, ANZELMO,
HARDY, MAXWELL & MCDANIEL
3445 N. Causeway Blvd.,
Suite 800
Metairie, LA 70002
(504) 831-0946

and

BEN L. MAYEAUX
One Petroleum Center, Suite 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
(337) 237-7000

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS STATE OF LOUISIANA

NO. 2005-11660 **DIVISION "H"**

SUSAN LAURENDINE, ET AL

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS, ET AL

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

This matter came before the Court for hearing on May 21, 2008 on Defendant's, Orleans Levee District, Motion to Recuse Judge Reese from presiding over the captioned matter which was filed by the Defendant, the Board of Commissioners for the Orleans Levee District (hereinafter "OLD"). This motion was allotted to Judge Bagneris for hearing. In its Motion, Defendant, OLD, also reurged its Motion to Recuse Judge Bagneris from hearing the Motion to Recuse Judge Reese.

Present: Darlene Jacobs
Jacobs & Sarrat
823 St. Louis Street
New Orleans, LA 70112
Attorneys for Plaintiffs

Thomas Anzelmo
McCranie, Sistrunk, Anzelmo,
Hardy, Maxwell & McDaniel
3445 N. Causeway Blvd.,
Suite 800
Metairie, LA 70002
Attorneys for Defendant,
The Board of Commissioners
for the Orleans Levee District

All Other Defendants through
their Counsel

WHEN, after considering the pleadings, evidence, law, and oral argument of counsels,

IT IS ORDERED, ADJUDGED AND DECREED that Defendant's, The Board of Commissioners for the Orleans Levee District, Motion to Recuse Judge Michael Bagneris from hearing the Motion to Recuse Judge Kern Reese is **DENIED** and the Motion to Recuse Judge Kern Reese is **DENIED** for the reasons set forth in the accompanying Reasons for Judgment.

JUDGMENT READ, RENDERED AND SIGNED on this 23rd day of May, 200[8].

/s/ Michael Bagneris
JUDGE MICHAEL G.
BAGNERIS

STATE OF LOUISIANA

NO. 2005-11660 **DIVISION "H"**

SUSAN LAURENDINE, ET AL

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS, ET AL

FILED: _____ _____

DEPUTY CLERK

REASONS FOR JUDGMENT

At the outset, this Court will address the Defendant's, Orleans Levee District, Motion to Recuse Judge Bagneris from Hearing the Motion to Recuse Judge Reese. This Motion was previously addressed and denied by the Court. The trial court's decision was affirmed by the Louisiana Fourth Circuit Court of Appeal and its writ application was later denied by the Louisiana Supreme Court. Defendant has reurged its Motion to Recuse Judge Bagneris from hearing the Motion to Recuse Judge Reese on the basis that Judge Bagneris has a pecuniary interest in this litigation and has prejudged the facts in this case such that the litigants, namely OLD, could not be guaranteed a fair trial and impartial tribunal.

After this court's original ruling in this matter and after a writ application was filed by OLD to the Louisiana Supreme Court, a federal lawsuit was instituted on behalf of Michael and Madlyn Bagneris

in the United States District Court, Eastern District of Louisiana under case number 07-5378 against several defendants, including the Board of Commissioners of the Orleans Levee District.

Because of this subsequent federal lawsuit, this Court entertained the rehearing on its own recusal. This judge stated on the record that if he were presiding over the merits of this case he would recuse himself pursuant to Canon 3(C) – the appearance of impropriety. However, this judge was not asked to preside over the merits. Rather, the court is being called upon to determine a single narrow issue: whether Article 151 of the Code of Civil Procedure mandates Judge Reese's recusal.

This Court's relationship or lack of relationship with the underlying case (*Laurendine*) does not impact its ability to determine whether the allotted Judge, Judge Reese, should be recused. Therefore, the Motion reurging Judge Bagneris' recusal from hearing the Motion to Recuse Judge Reese is DENIED.

Addressing the defendant's Motion to Recuse Judge Reese, it should be emphasized that the only issue before this Court is whether Judge Reese's recusal is warranted under the exclusive provisions of Louisiana C.C.P. Article 151. This Court cannot make a judicial determination as to whether there is an appearance of impropriety under Canon 3(C). That determination is within the province of Judge Reese. Whether, in the final analysis, a proper decision was

made by him can only be determined by the Louisiana Supreme Court.

Upon review, OLD's Motion to Recuse Judge Kern Reese from this litigation is DENIED. This Court finds that pursuant to LA C.C.P. Art. 151, defendant has failed to make an **actual showing** and **finding** of bias and prejudice which would warrant Judge Reese's recusal in this case.

The case in question (*Laurendine*) is a class action based on injuries or damages sustained to property owners in Orleans Parish whose persons, properties or businesses were damaged by flooding caused by the failure of the 17th Street Canal and London Avenue Canal levees on or after August 29, 2005. In particular, the Second Supplemental and Amending Petition defines the class as follows:

> All residents, domiciliaries, property owners and business owners of the Parish of Orleans and Jefferson in the State of Louisiana whose persons, properties or businesses were damaged by flooding caused by the failure of the 17th Street Canal and London Avenue Canal hurricane protection levees and floodwalls in New Orleans, Louisiana on or after August 29, 2005, who may suffer such injuries or damage in the future as a result thereof or who have sustained a justifiable fear of sustaining such injury or damage in the future as a result thereof.

In its Motion to Recuse, OLD alleges the following:

1) All the Civil District Court Judges are either putatitve class members and therefore have an interest in this litigation, and/or

2) Have family members, within the fourth degree, who are putative class members which would disqualify the Judge from hearing the case, and

Upon review, La C.C.P. Art. 151(A) is inapplicable to the case at bar. Defendant's allegations for recusal are based on Art. 151 Subsections B(4) and (5). Under the clear language of Article 151 B, a judge **may** be mused if he is the spouse of a party or is related to a party in the cause. Here, there is no dispute that neither Judge Reese's spouse nor his children are named parties in the *Laurendine* case which was randomly allotted to Judge Reese.

Also, this Court cannot rely on presumptions as grounds for a recusal. Here, the defendants are asking this court to **presume** that the class will be certified; to **presume** that the current class definition will remain unchanged; and to **presume** that Judge Reese's family members will elect to become members of this class.

The only facts adduced during the Hearing on the Motion to Recuse is that Judge Reese's family members **may** fall within the geographical area described in the class definition and **may** be **potential** putative members of that class in this matter.

Turning to La C.C.P. Art. 151B(5), this court finds that there has been no evidence presented that

Judge Reese is "biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings." The facts presented at the Hearing are, simply stated, wholly insufficient to rise to the level which would warrant a recusal.

Specifically, Judge Reese testified that the residence at xxxxx xxxxx xxxxx and the personal property therein which was destroyed by the effects of Hurricane Katrina was his wife's separate property. Judge Reese revealed that he and his wife have no community property. Moreover, Judge Reese made clear that the decision to file lawsuits in federal court against several defendants, including OLD, was made by his spouse and children along with their attorneys.

As such, this Court finds that Defendant has failed to make an **actual** showing that Judge Reese is biased and/or has some interest in the outcome of the cause. Therefore, LA C.C.P. Article 151(B)(5) is not applicable. *See Ainsworth v. Ainsworth,* 860 So.2d 248 (LA App 4 Cir. 2003). Such bias, prejudice or personal interest to warrant recusal must be of a substantial nature and based on more than just conclusory allegations. *See Augman v. City of Morgan City,* 864 So.2d 248 (La app 3 Cir. 2003). This Court also relies on the reasoning in the recent decision of *Berthelot v. Boh Brothers Construction Co., L.L.C.,* 431 F. Supp 639.

Based on the foregoing, there is no codal basis to recuse Judge Kern Reese from presiding over the merits of the *Laurendine* case. The Defendant has simply not proven and/or otherwise substantiated its allegations that Code of Civil Procedure Article 151 requires that Judge Reese be recused. Additionally, as indicated earlier, this Court does not have the authority to issue a ruling regarding Canon 3(C). Whether an appearance of impropriety exist [sic] can only be answered by Judge Reese or, if need be, by the Louisiana Supreme Court.

Thus, the Board of Commissioners for the Orleans Levee District's, Parish of Orleans, Motion to Recuse Judge Kern Reese is DENIED.

New Orleans, Louisiana this 23rd day of May, 200[8].

/s/ Michael Bagneris
JUDGE DIVISION "H"

NO. 2008-C-0821

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

SUSAN AND WILLIAM LAURENDINE, ET AL.

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, ETC.

IN RE: THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT

APPLYING FOR: SUPERVISORY WRIT

DIRECTED TO: HONORABLE KERN A. REESE
CIVIL DISTRICT COURT,
ORLEANS PARISH
DIVISION "L-6", 05-11660

(Filed Jul. 28, 2008)

WRIT DENIED

We find that Judge Michael Bagneris did not abuse his discretion in denying the relator's motion to recuse Judge Kern A. Reese from presiding over the matter of *Laurendine v. The Board of Commissioners for the Orleans Levee District*, Civil District Court No. 2005-11660, Division "L".

New Orleans, Louisiana, this 28th day of July, 2008.

/s/ ML
JUDGE PRO TEMPORE
MOON LANDRIEU

/s/ JBA
CHIEF JUDGE
JOAN BERNARD ARMSTRONG

/s/ Tobias, J., Concurs and Assigns reasons
JUDGE MAX N. TOBIAS, JR.

TOBIAS, J., CONCURS AND ASSIGNS REASONS.

I respectfully concur because I personally know the trial judges assigned in this case and I believe them capable of being fair and impartial in trying issues involved in this high visibility case.

Nevertheless, I feel compelled to note *Scott v. American Tobacco Co.*, 01-2498 (La. 9/25/01), 795 So. 2d 1176, a different high visibility case that might suggest a different result. When the substantially identical issue was before this court as it related to jurors, not a judge, I stated:

> The purpose of voir dire is to empanel a fair and impartial jury and allow the parties to intelligently exercise their peremptory challenges. Prospective jurors are questioned to discover bias or prejudice regarding the circumstances of the case. A trial judge has broad discretion to regulate and supervise

> voir dire and rule on challenges. The rulings governing the selection of a civil jury are reversed only when a review of the entire voir dire reveals that the judge has abused that broad discretion. *Carter v. Baham*, 95-2126 (La. App. 4 Cir. 10/9/96), 683 So. 2d 299, 302.
>
> La. C.C.P. art. 1765, which is substantially identical to La. C. Cr. P. art. 797, provides the grounds for a cause challenge in a civil trial, and states in pertinent part:

A juror may be challenged for cause based upon any of the following:

* * *

> (3) When the relations whether by blood, marriage, employment, friendship, or enmity between the juror and any party or his attorney are such that it must be reasonably believed that they would influence the juror in coming to a verdict. (Emphasis added.)
>
> In the instant case, thirteen out of the twenty-two jurors and alternates selected to hear this matter have immediate family members who are prospective members of the defined class.[1] I find that the trial court

---

[1] Juror No. 1-father; Juror No. 2-father; Juror No. 5-father; Juror No. 7-mother; Juror No. 10-huband [sic] and sons; Juror No. 11-sister; Juror No. 12-father; Alternate No. 13-brother; Alternate No. 14-father; Alternate No. 17-father; Alternate No. 18-mother; Alternate No. 21-husband and mother;

(Continued on following page)

should have excused these jurors for cause at the beginning of voir dire and that it abused its broad discretion by seating them on the jury.

Relations by "blood" or "marriage" in La. C. C. P. 1765 clearly refer to immediate family members, and without doubt, refer to someone related to another within the second degree. The words "immediate family" have a clear meaning in our law. For purposes of the Code of Governmental Ethics, La. R. S. 42:1101, *et seq.*, "immediate family" means "his children, the spouses of his children, his brothers and their spouses, his sisters and their spouses, his parents, his spouse, and the parents of his spouse." La. R. S. 42:1102(13). This definition is applied to agency heads, governing authorities and chief executives of governmental agencies who are prohibited from employing immediate family members. La. R. S. 42:1119(A, B).[2]

Alternate No. 22-mother. (Jurors are referred to by number to protect their identity.)

[2] Canon 3B(4) of the Code of Judicial Conduct also prohibits nepotism. There, "immediate family" means a judge's children, parents, brothers and sisters: the children and parents of a judge's spouse; the spouses of a judge's children; and all step relationships to the same degree. *See also*, La. R. S. 4:703(6): "'Immediate family' means the subject individual's spouse, children, parents, brothers and sisters, spouses of children, and spouses of brothers and sisters."; La. R. S. 17:4161(2): "For the purposes of this Subsection, immediate family means the individual's children, brothers, sisters, parents, and spouse and

(Continued on following page)

A juror can be likened to a "public employee," which is defined as one who is engaged in the performance of a governmental function, whether compensated or not. La. R. S. 42:1102(18)(c). The primary objective of the Code is to prevent not only actual conflicts of interest, but also to prevent the occurrence of those situations that create a perception of conflicts of interest. *Citywide Testing & Inspections, Inc. v. Board of Ethics for Elected Officials*, 96-1656 (La. App. 1 Cir. 5/9/97), 693 So. 2d 1312, *writ denied*, 97-1509 (La. 10/3/97), 701 So. 2d 198.

It stands to reason that a juror should not have a member of his or her immediate family, and certainly not someone related within the second degree, as an actual party to the lawsuit. One cannot reasonably expect a juror to put aside his or her personal feelings and render a decision that is fair and impartial without regard to the health and welfare of a member of his or her immediate family, and especially to a family member related within

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the children, brothers, sisters, and parents of the spouse."; La. R. S. 17:500.2A(2)(b): "'Immediate family member' means a spouse, parent, or child of a school bus operator."; La. R. S. 17:1202A(2)(b): "'Immediate family member' means a spouse, parent, or child of a teacher."; La. R. S. 33:2501 D: "Also, any immediate family member of the appealing employee shall recuse himself from voting on any such decision. For purposes of this Subsection, immediate family member shall mean any parent, child, sibling, or spouse."; La. R. S. 33:2561 D:same; La. R. S. 46:56F(12)(a): "For the purposes of this Paragraph, "immediate family member" means the child's parent or grandparent."

the second degree. At the very least, the perception of a conflict of interest exists. Allowing a juror to decide a case that will directly affect a member of his or her most immediate family taints the entire process and calls into question the integrity of the verdict itself.[3]

This rationale finds further support in the rules governing recusation of a judge in both civil and criminal cases. For example, in La. C. C. P. art. 151B(4), a judge may be recused when he or she is "the spouse of a party, or of an attorney employed in the cause; or is related to a party, or to the spouse of a party, within the fourth degree. . . . " This prohibition is even stronger in La. C. Cr. P. art. 671A(2), which mandates the recusal of a judge who is so related. If a judge, who by training is educated to divorce himself/herself from bias toward a party, should not and cannot decide cases affecting members of his or her immediate family, the

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[3] I reject the plaintiffs' rationale that "no class member will be awarded any money damages," as a reason to deny the writ application. Certainly, free medical monitoring of class members for 25 years (plaintiffs' proposed program) involves a considerable amount of money. Thus, each juror with an immediate family member in the class may have a pecuniary interest, direct or indirect, in the outcome of this litigation. Notably, the Supreme Court in *Bourgeois v. A.P. Green Indust., Inc.*, 97-3188, p. 11 (La. 7/8/98), 716 So. 2d 355, 361, held that a claim for medical monitoring is compensable and a plaintiff who demonstrates a need for same has suffered damage in the form of the costs required to pay for this care.

court cannot expect a lay person to be fair and impartial under similar circumstances. It is axiomatic that a judge must be recused if he or she is related to a party within the second degree.

I recognize that in a civil case, La. C. C. P. art. 1765(3) uses the permissive "may," when addressing the dismissal of juror for a blood relationship with any party. Certainly, it can be argued that because removal of such a juror is not mandatory, the trial court cannot abuse its discretion in denying a challenge on this basis. Normally, that would be a persuasive argument. However, this is an extremely high profile case affecting thousands of Louisiana residents for possibly the next twenty-five years, It is imperative that the jury selected avoid even the appearance of impropriety which would inevitably exist if a juror was deciding remedies affecting his or her own immediate family member, and especially his or her own mother, father, sister, brother, or child.

Finally, I recognize that during voir dire jurors are asked in some form whether they can be "fair and impartial." The question takes on special significance when a juror has an immediate family member in the class. While such a statement clearly meets the standard legal burdens of fairness and ability to serve as a juror, the statement fails the psychological burdens of credibility. Arthur H. Patterson & Nancy L. Neufer, *Removing Juror Bias by Applying Psychology*

to Challenges for Cause, 7 Cornell J. L. & Pub. Pol'y 97, 100 (1997). Whether a prospective juror states that he or she can be fair and impartial because the juror truly believes this to be true or because the juror is responding to pressure from the judge or counsel is irrelevant. As it would clearly be unacceptable for a judge to sit with an actual conflict, or a strong appearance of a conflict, so it should be for a juror.

In opposing the writ application, the plaintiffs reference cases where a juror was allowed to sit despite some kind of relationship, past or present, with a party or lawyer involved in the litigation. None of these cases, however, involves an immediate family member of a party as the matter *sub judice*. I believe that a lack of Louisiana jurisprudence on the point is most likely due to no court having ever seated a juror who was the mother, father, sister, brother, or child of a party to the suit.

The defendants also complain that the trial court erred in seating Jurors 3 and 18 because they clearly evidence a bias against the defendants. I note that the defendants used all but two peremptory challenges during voir dire. The defendants argue that these two peremptory challenges were left due to the court's disallowance of backstrikes and a change in procedure on the third day of voir dire. In *Riddle v. Bickford*, 00-2408 (La. 5/5/01), 785 So. 2d 795, the Supreme Court held that the right to backstrike in

civil cases is left within the sound discretion of the trial judge, who ultimately has the responsibility for orderly conduct of the trial. *Id.* at p. 12, 785 So. 2d at 803. Further, La. C. C. P. art. 1631(A) provides that the court has the power to require that the proceedings shall be conducted with dignity and in an orderly and expeditious manner, and to control the proceedings at the trial, so that justice is done. The trial court did not abuse its sound discretion in conducting voir dire in this matter.

I note that the jurisprudence of other circuits, namely, *Bernard v. Richoux*, 464 So.2d 856 (La. App. 5 Cir.1985); *Dawson v. Mazda Motors of America, Inc.*, 517 So. 2d 283 (La. App. 1 Cir. 1987), holds that a party cannot complain of the trial judge's failure to excuse a juror for cause if that party's peremptory challenges have not been exhausted. However, the more recent case of *State v. Robertson*, 92-2660 (La. 1/14/94), 630 So. 2d 1278, indicates that a party may appeal from the denial of a cause challenge even if all its peremptory challenges have not been exhausted if prejudice is demonstrated. In the context of this case, I find that the trial court has abused its discretion in failing to excuse jurors nos. 3 and 18 who should have been

excused for cause due to their obvious bias against the defendants.[4]

Finally, I decline to review the trial court's decision to dismiss for cause prospective jurors who fall within the class definition, *i.e.*, smokers and former smokers, although they declined medical monitoring. The court did not abuse its discretion in dismissing these individuals since they could later change their minds about being involved in the class.

Accordingly, I concur in the writ in part to excuse jurors nos. 3 and 18, but I dissent from the failure of the majority to excuse the jurors listed in footnote one above.

The ultimate question to me in this case must be the appearance of impropriety of the trier of fact, especially in this high visibility case affecting a large number of individuals. Just as a juror or a juror's family member's potential claim might call for the disqualification of a particular juror, a judge, because of the judge's personal experience or a judge's family member's potential claim, might be required to be recused. A trial judge is required to examine whether he or she or his or her colleague on the bench should be disqualified because of the reasonable appearance to the parties and the public of impropriety.

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[4] Of course, juror no. 18 should have been excused for cause for the reasons discussed above relating to his mother.

NO. 2008-C-0822

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

SUSAN AND WILLIAM LAURENDINE, ET AL.

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, ETC.

IN RE: THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT

APPLYING FOR: SUPERVISORY WRIT

DIRECTED TO: HONORABLE
MICHAEL G. BAGNERIS
CIVIL DISTRICT COURT,
ORLEANS PARISH
DIVISION "H-12", 05-11660

(Filed Jul. 28, 2008)

WRIT DENIED

The relator, the Board of Commissioners for the Orleans Levee District, produced no evidence of bias on the part of Judge Michael Bagneris to preside over the hearing on the relator's motion to recuse Judge Kern A. Reese from the case of *Laurendine v. The Board of Commissioners for the Orleans Levee District*, Civil District Court No. 2005-11660, Division "L". Thus, we find Judge Bagneris did not abuse his discretion in denying the relator's motion to recuse him from hearing the relator's motion to recuse Judge Reese from the *Laurendine* case.

New Orleans, Louisiana, this 28th day of July, 2008.

/s/ ML
JUDGE PRO TEMPORE
MOON LANDRIEU

/s/ JBA
CHIEF JUDGE
JOAN BERNARD ARMSTRONG

/s/ Tobias, J., Concurs and Assigns Reasons
JUDGE MAX N. TOBIAS, JR.

TOBIAS, J., CONCURS AND ASSIGNS REASONS.

I respectfully concur for the reasons assigned in writ number 2008-C-0821.

The Supreme Court of the State of Louisiana

SUSAN AND WILLIAM LAURENDINE, ET AL.

VS. NO. 2008-CC-2118

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, ETC.

IN RE: Board of Commissioners Orleans Levee District, etc.; – Defendant; Applying for Supervisory and/or Remedial Writs, Parish of Orleans, Civil District Court Div. H, Nos. 2005-11660; to the Court of Appeal, Fourth Circuit, No. 2008-C-0821

November 10, 2008

Denied.

PFC

CDK

BJJ

CDT

JTK

VICTORY, J., would grant.

WEIMER, J., would grant.

Supreme Court of Louisiana
November 10, 2008

/s/ Katherine A. Fontane
Deputy Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

SUSAN AND WILLIAM LAURENDINE, ET AL.

VS.

NO. 2008-CC-2119

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, ETC.

IN RE: Board of Commissioners Orleans Levee District, et al.; – Defendant; Applying for Supervisory and/or Remedial Writs, Parish of Orleans, Civil District Court Div. H, Nos. 2005-11660; to the Court of Appeal, Fourth Circuit, No. 2008-C-0822

November 10, 2008

Denied.

PFC

CDK

BJJ

CDT

JTK

VICTORY, J., would grant.

WEIMER, J., would grant.

Supreme Court of Louisiana
November 10, 2008

/s/ Katherine A. Fontane
Deputy Clerk of Court
For the Court

**CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA**

DOCKET NO.: 05-11660 DIVISION "L"

**SUSAN AND WILLIAM LAURENDINE,
AL LEBOUEF, ALINE HODGES,
PIERRE ASCANI, THERESA HARVEY,
THE HONORABLE DALE N. ATKINS
AND ANITA SARRAT**

VERSUS

**THE BOARD OF COMMISSIONERS
FOR THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS**

**FILED:_____ _____
DEPUTY CLERK**

MOTION TO RECUSE

(Filed May 19, 2008)

NOW INTO COURT, through undersigned counsel, comes defendant, the Orleans Levee District ("OLD") who, for the reasons set forth more fully in the accompanying Memorandum, respectfully moves this Honorable Court to enter an order (1) recusing himself from this matter including, but not limited to his hearing of the Motion to Recuse Judge Kern Reese, and/or, should the Court elect to proceed, (2) recusing Judge Reese from this matter. Defendant submits that both Your Honor and Judge Reese have a pecuniary interest in this litigation and have prejudged the facts in this case such that failure to

recuse would violate defendant's Due Process rights, enumerated in the Fourteenth Amendment to the U.S. Constitution, which guarantees to all litigants the right to a fair trial and an impartial tribunal, the Louisiana Code of Civil Procedure article 151, and the Code of Judicial Conduct. In support of this Motion, defendant attaches and incorporates the following exhibits:

1. *Michael G. and Madlyn P. Bagneris vs. United States of America, Board of Commissioners of the Orleans Levee District, et al,* United States District Court for the Eastern District of Louisiana, Civil Action No. 07-5378 with exhibits;

2. *Dorothy Reese v. United States of America, Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-4999 with exhibits;

3. *Dorothy Reese v. Allstate Insurance Company*, United States District Court, Eastern District of Louisiana, Civil Action No. 06-4873 with exhibits;

4. *Justin Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-5148;

5. *Jared Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court,

Eastern District of Louisiana, Civil Action No. 07-5150;

6. September 14, 2005 Act of Cash Sale by Michael G. and Madelyn P. Bagneris.

Exhibit "1" is a recent federal court complaint filed against the OLD by you and your wife, Madlyn Bagneris, with allegations strikingly similar to those alleged in the present lawsuit. Likewise, Dorothy Reese, Judge Reese's wife, has filed a lawsuit against the OLD seeking compensation for hurricane damage to the home of Judge and Mrs. Reese. Exhibit "2". Exhibits "4" and "5" are additional lawsuits against the OLD filed by close members of the Reese family. Finally, Exhibit "6" evidences the marital relationship between Michael G. and Madelyn P. Bagneris.

Respectfully submitted,

/s/ Thomas P. Anzelmo
Thomas P. Anzelmo, T.A. (#2533)
Mark E. Hanna (#19336)
Kyle P. Kirsch (#26363)
Andre J. Lagarde (#28649)
McCRANIE, SISTRUNK,
ANZELMO, HARDY,
MAXWELL & McDANIEL
3445 N. Causeway Boulevard,
Ste. 800
Metairie, LA 70002
TELEPHONE: (504) 831-0946
FACSIMILE: (504) 831-2492

And

James L. Pate #10333
Ben L. Mayeaux #19042
LABORDE & NEUNER
One Petroleum Center, Suite 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
TELEPHONE: (337) 237-7000
FACSIMILE: (337) 233-9450
Attorneys for
The Orleans Levee District

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been hand delivered to The Honorable Michael G. Bagneris.

The above and foregoing has also been served on all known counsel of record via either electronic transmission, fax, hand delivery and/or by mailing same to each, postage prepaid and properly addressed.

Metairie, Louisiana, this 19th day of May, 2008.

/s/ Thomas P. Anzelmo

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS STATE OF LOUISIANA

DOCKET NO.: 05-11660 DIVISION "L"

SUSAN AND WILLIAM LAURENDINE, AL LEBOUEF, ALINE HODGES, PIERRE ASCANI, THERESA HARVEY, THE HONORABLE DALE N. ATKINS AND ANITA SARRAT

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS

FILED:_____ _____

DEPUTY CLERK

MEMORANDUM IN SUPPORT OF MOTION TO RECUSE

MAY IT PLEASE THE COURT:

Defendant, the Orleans Levee District ("OLD"), submits the following Memorandum in Support of its Motion to Recuse:

FACTS:

On September 24, 2005, plaintiffs instituted the present litigation, naming the OLD as defendant, seeking damages that resulted from Hurricane Katrina. In their original "Claim for Damages," plaintiffs alleged negligence of the OLD as follows:

6.

a. Designing and installing concrete flood walls which were below standard and potentially unstable in a flood;

b. Failing to test the flood walls for their ability to withstand cascades of lake water that may push over levees during a hurricane;

c. Failing to interlock the flood walls and/or place a top railing or similar system to bind the walls together.

Claim for Damages, ¶ 6. Plaintiffs further averred that "the number of business and property owners affected by the negligence of the defendant are too numerous to mention," and thus, sought class certification for "all residents, business owners, and occupants of the affected areas." (Claim for Damages, ¶ 8).

By a First Supplemental and Amending Petition, plaintiffs re-designated the named plaintiffs and added additional theories of negligence against the defendant, OLD, to wit:

d. Failing to inspect and maintain the levees after their completion;

e. Failing to insure that the proper soil was used in the construction of the levee.

(First Supplemental and Amending Petition, ¶ 6). The putative class was also expanded to include "all residents domiciliary and property owners of the Parishes of Orleans and Jefferson" "who were affected by the flooding caused by the failure of the hurricane

protection levees and flood wall in New Orleans." (First Supplemental and Amending Petition, ¶8a). By a Second Supplemental and Amending Petition, plaintiffs named additional defendants, and re-averred all allegations of negligence against OLD. The putative class was then redefined as:

> All residents, domiciliaries, property owners and business owners of the parishes of Orleans and Jefferson in the State of Louisiana whose persons, properties or businesses were damaged by flooding caused by the failure of the 17th Street Canal and London Avenue Canal hurricane protection levees and floodwalls in New Orleans, Louisiana on or after August 29, 2005, who may suffer such injury or damage in the future as a result thereof or who have sustained a justifiable fear of sustaining such injury or damage in the future as a result thereof.

(Second Supplemental and Amending Petition, ¶ 8a).

OLD filed a Motion to Recuse all judges of the Civil District Court for the Parish of Orleans on August 30, 2006. On February 15, 2007, OLD filed an individual Motion to Recuse this Court from hearing the Motion to Recuse Judge Reese. All briefs filed by OLD in support of either motion are adopted herein as if copied in their entirety. On April 30, 2007, this Court denied the Motion to Recuse Judge Bagneris, The OLD filed an application for supervisory writs with the Fourth Circuit which was denied on June 25,

2007. OLD filed an application for supervisory writs with the Supreme Court which was denied.

But on September 4, 2007, after denying the OLD's Motion to Recuse, and after OLD's writ application had been filed at the Louisiana Supreme Court, Your Honor filed a complaint against the OLD in the United States District Court for the Eastern District of Louisiana,[1] seeking compensation for property damage to your home at xxxxx xxxxx xxxxx, xxxxx, xxxxx. This complaint supports OLD's contention that this Court should be recused from this matter.

Your Honor's negligence allegations against the OLD include, but are not limited to: deficiency in design and construction of the 17th Street Canal's levees and floodwalls, (¶ 115), negligently failing to install floodgates at the 17th Street Canal (¶116), inadequate design and build of levee and floodwall system on 17th Street Canal (¶116), negligent design and construction of I-walls extending 11 feet above ground, disregarding reports of weakened soil conditions (¶ 117), and failing to maintain and inspect properly the 17th Street Canal levee/floodwall (¶ 118). The negligence allegations include knowledge

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[1] Civil Action No. 07-5378 entitled "Michael G. and Madlyn P. Bagneris vs. United States of America, Board of Commissioners of the Orleans Levee District, et al." which includes Exhibit "A", Form 95 of the Dept. of Justice, Claim for Damage, Injury or Death. That form lists Madlyn and Michael Bagneris as witnesses.

or constructive knowledge of the OLD regarding alleged design and construction deficiencies in light of the soil and the height and instability of the I-walls. (¶ 115). Damages alleged are those resulting from the levee failures that occurred during or as a result of Hurricane Katrina.

The allegations of the federal complaints, although expanded and more comprehensive, are essentially identical to those alleged in the present matter, and damages sought are those resulting from hurricane and flood effects as in the case at bar. This complaint evidences this Court's pre-judgment of the facts of this case and your belief that the OLD was negligent and is liable for the levee failures during Hurricane Katrina. This pre-judgment of the facts and pre-determination of liability reflects Your Honor's bias in this matter and the overwhelming appearance of bias and impartiality. It also reveals the Court's pecuniary interests in holding the OLD liable for the damages resulting from the levee failures, as a finding of liability in this matter would influence the outcome of the federal court actions.[2]

In addition to the lawsuit against the OLD filed by Your Honor and your wife, Judge Reese's wife and close family members of Judge Reese, within the fourth degree, have likewise filed similar lawsuits

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[2] See *Aetna Life Insurance Co., v. Lavoie*, 1985 WL 669002 (1985).

against the OLD for damages resulting from levee failures related to Hurricane Katrina.[3] These lawsuits, filed by Dorothy Reese, Justin Reese, and Jared Reese, set forth claims of negligence against the OLD that are nearly identical to the allegations of Your Honor's complaint. Dorothy Reese is the wife of Judge Kern Reese; her lawsuit seeks compensation for damages to the property at xxxxx xxxxx xxxxx, the home of Judge Kern Reese and his wife, Dorothy.[4] It is believed that Justin and Jared Reese are also close relatives of Judge Kern Reese. Considering the lawsuit seeking compensation for damages to the home of Judge and Mrs. Reese, it is certain that Judge Reese has also pre-judged the facts and has a pecuniary

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[3] *Dorothy Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-4999 (Exhibit "2"); *Justin Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-5148 (Exhibit "3"); *Jared Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-5150 (Exhibit "4"). Exhibits 2 and 3 state that on August 29, 2005, the named plaintiffs resided at xxxxx xxxxx xxxxx, the home of Judge and Mrs. Reese. (Complaints, ¶ 2.)

[4] See Act of Cash Sale dated September 14, 2005, attached to Motion to Recuse as Exhibit "5", whereby Judge Reese and Dorothy Reese purchased property in Baton Rouge, Louisiana. The buyers are listed as "Kern A. Reese and Dorothy F. Reese, both persons of the full age of majority, married and living together." Dorothy Farmer Reese is the wife of Judge Kern Reese.

interest in the outcome of this lawsuit, and is biased against the OLD. Accordingly, he also should be recused from this matter.

LAW AND ARGUMENT

I. The Due Process Clause of the Fourteenth Amendment guarantees the right to a fair and impartial tribunal. Actual bias by the tribunal is prohibited. Additionally, the possibility of unfairness must be prevented to promote the appearance of justice. These rights are recognized by the Louisiana Code of Civil Procedure and the Code of Judicial Conduct.

The Due Process Clause of the Fourteenth Amendment guarantees to all litigants the right to a fair trial and an impartial tribunal.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored **to prevent even the probability of unfairness**. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In Re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955) (emphasis added).

The Louisiana Code of Civil Procedure recognizes the inability of a judge to fairly and impartially

preside over certain matters and provides a mechanism for recusal.

> (A) A judge of any court, trial or appellate, shall be recused when he is a witness in the cause.
>
> (B) A judge of any court, trial or appellate, may be recused when he:
>
> > (4) Is the spouse of a party, or of an attorney employed in the cause; or is related to a party, or the spouse of the party, within the fourth degree; or is related to an attorney employed in the cause; or is the spouse of the attorney within the second degree.
> >
> > (5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings.

La. Code of Civ. Pro. art. 151(A)(B)(4)-(5). That a judge should be recused in any matter in which his **impartiality might even be questioned** is recognized by the Code of Judicial Conduct:

> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned and shall disqualify himself or herself in a proceeding in which disqualification is

> required by law or applicable Supreme Court rule.

Canon 3(C) of the Code of Judicial Conduct.[5] In addition to the permissive basis for recusal, the law espoused by the Due Process Clause, the Louisiana Code of Civil Procedure, and the Code of Judicial Conduct makes it clear that a judge:

1. must be recused if he has an interest in the outcome,
2. must be recused if he is a witness in the matter;
3. must recuse himself in a matter in which disqualification is required by law or Supreme Court rule;
4. should be recused in any matter in which his impartiality might be questioned.

The OLD submits that both Your Honor and Judge Reese must be recused from this matter.[6] At a

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[5] The Honorable Judge Robin Giarrusso recused herself from related flood litigation in *Brubbacher v. Board of Commissioners for the Orleans Levee District, et al*, Case no. 2006-9775. Additionally, Judges Cade, Medley and Ledet have also recused themselves in matters involving flood litigation resulting from Hurricane Katrina.

[6] Cf. 28 U.S.C.A. § 455, pursuant to which a United States judge must recuse himself in any matter in which "his impartiality might reasonably be questioned" or where "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

minimum, in light of the pending lawsuits against the OLD for hurricane damage to your homes, the impartiality of each is reasonably questioned and recusal is warranted. Because of your pre-conceived notions of liability and pre-judgment of the facts as demonstrated by the lawsuits filed on your behalf, the "probability of unfairness" is so great that neither Your Honor nor Judge Reese should preside over any aspect of the present matter.

II. Judges Bagneris and Reese have prejudged the facts and issues in this matter and each has a pecuniary interest in the determination of the issues. Thus, they are constitutionally disqualified from presiding over the present case.

a. The federal lawsuits evidence the judges' prejudgment of the facts of this case and warrant recusal pursuant to the Due Process Clause of the Fourteenth Amendment.

In *Gibson v. Berryhill*, 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973) the United States Supreme Court considered under what circumstances bias rose to such a level as to prohibit an administrative board from constitutionally presiding over a license revocation hearing. In *Gibson*, the Alabama Optometry Board ("Board") sought to revoke the licenses of several optometrists who practiced as employees of a corporation, Lee Optical, allegedly

constituting the "unlawful practice" of optometry, in violation of Alabama law.[7] Shortly after the administrative charges were brought before the Board, the Board filed a lawsuit against Lee Optical, seeking to enjoin the company from the "unlawful practice of optometry." *Id.* at 568, 1693. The state trial court granted the Board's injunction, prohibiting the corporation from employing the optometrists. *Id.* at 569, 1693.

The Board then resumed the administrative proceeding against the optometrists, seeking to revoke their licenses. In response, the optometrists filed a lawsuit in federal court, alleging Civil Rights violations, and seeking an injunction preventing the Board from hearing the pending charges. *Id.* at 569, 570, 1693. Because the Board was composed only of those optometrists who were independent optometrists, not employed by others, those optometrists employed by Lee Optical alleged that the "Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law." *Id.* at 570, 1693.

The United States District Court noted that the Board, which served as judge and prosecutor in the de-licensing proceedings, had previously filed suit in state court against the plaintiffs for charges virtually identical to those before it in the administrative de-licensing proceeding. *Id.* at 571, 1694. **Considering**

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[7] *Gibson*, 411 U.S. at 567, 93 S. Ct. at 1692.

the earlier lawsuit by the Board, the Board might have "preconceived opinions" regarding the charges pending before it. *Id.* Second, because Lee Optical had a large business in Alabama, the Board members stood to gain financially by suspending the optometry licenses of the Lee Optical employees. *Id.*

The District Court found the Board impermissibly biased for two reasons: (1) the Board had filed substantially identical charges against the optometrists in state court, evidencing the Board's prejudgment of the facts, and (2) the aim of the Board was to revoke the licenses of the optometrists who held one-half of the business in the State which would enure to the financial benefit of the Board members' optometry practices. *Id.* at 578, 1697-98. The District Court held that the Board's bias constitutionally disqualified the Board from presiding over the de-licensing proceedings. *Id.* at 578, 1698. The United States Supreme Court affirmed the District Court, opining: "It is sufficiently clear from cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Id.* at 579, 1698 (citing *Tumey v. Ohio*, 47 S. Ct. 437, 441 (1927).[8]

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[8] Although *Tumey v. Ohio* involved the disqualification of a mayor to preside over a criminal action, which, upon conviction, provided funds to the city, the protections guaranteed by the Due Process Clause extend to both criminal and civil matters. See *Aetna Life Insurance Co., v. Lavoie*, 1985 WL 669002 (1985).

The rationale espoused in *Gibson v. Berryhill* is decisive here. In your federal court lawsuit, this Court alleges negligence of the OLD and that that negligence caused or led to the levee failures which resulted in the flooding of your home. **The assertion that Your Honor has pre-judged the facts cannot be disputed. Your lawsuit is clear evidence of this Court's belief that the OLD was negligent, and should be held liable for damages resulting from the flood.** It is highly improbable that Your Honor could be unbiased in the present case. Likewise, Judge Reese's wife has filed a lawsuit against OLD seeking compensation for flood damages to the home of Judge and Mrs. Reese. Certainly, Judge Reese has a pre-conceived notion as to the negligence and liability of the OLD and he could not be unbiased in this matter.

b. Each judge has a pecuniary interest in the outcome of this matter.

In determining whether recusal is warranted, the United States Supreme Court noted that a judge's interest in a case "cannot be defined with precision. Circumstances and relationships must be considered." *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625. The circumstances presented by the present case are indeed extreme. "[I]t certainly violates the Fourteenth Amendment. . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his

case." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22, 106 S. Ct. 1580, 1585, 89 L. Ed. 823 (1986) (citing *Tumey*, 273 U.S. at 523, 47 S. Ct. at 441).

The interest of this Court and Judge Reese in the present matter is twofold. First, as discussed above, each judge has a lawsuit pending against the OLD for flood damages to their homes, Second, this instant lawsuit seeks class certification of a proposed class that would include both you, your wife, and Judge Reese and his wife as class members. A judgment or ruling adverse to the interests of the OLD in this litigation would influence the outcome of the federal litigation by creating collateral estoppel issues. Moreover, as putative class members in the case at bar, Your Honor and Judge Reese have a direct pecuniary interest in the outcome of this litigation.

i. A determination in this matter that the OLD is liable would influence the value of the judges' federal lawsuits.

A finding of liability against the OLD could influence the pending federal proceedings against the OLD. The federal complaints allege violations of Louisiana state law which,[9] pursuant to the Erie

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[9] *Dorothy Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, Exhibit "2", ¶¶11, 13; *Michael G. and Madelyn P. Bagneris v. United States of America Board of Commissioners of the Orleans Levee District, et al.*; Exhibit "1", ¶¶15, 17.

doctrine, must be decided in accordance with Louisiana state law. Thus, the determination of the state law issues in the present case would create precedence for determination of the state law issues in the federal lawsuits. The advantage to be obtained by the judge should not be gained from the proceeding over which he presides. "An interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal **even if that goal is not actually attained in that proceeding."**[10]

The lawsuits filed by Your Honor and the wife of Judge Reese, against the same defendant, the OLD, alleging nearly identical claims, dictate that neither judge could fairly and impartially preside over any aspect of the present matter. Although the lawsuits filed against the OLD for Hurricane Katrina related damages were filed in the federal court system, the lawsuits involve the same alleged acts of negligence as those presented by the case at bar. Thus, neither judge can impartially preside over this matter.

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[10] *Aetna Life Ins. Co.*, 475 U.S. 813, 830, 106 S. Ct. 1580, 1589-90, 89 L. Ed. 2d 823 (Brennan, J, concurring) (emphasis added).

ii. Judge Bagneris and Judge Reese are potential class members of the current lawsuit, as are their family members. Thus, each has a pecuniary interest in certifying the class and rendering judgment against the OLD.

As property owners in Orleans Parish who suffered property damage as a result of levee breaches, Your Honor, Judge Reese, and their respective wives are clearly putative class members as defined in the present litigation. Thus, there exists a pecuniary interest in the proposed class action which mandates recusal.

La. Code Civ. Proc. art. 151 B(4) authorizes recusal when the judge, his spouse, or a family member is a party to the litigation. As evidenced by the federal court pleadings, the homes of Your Honor and Judge Reese were flooded thereby according status as putative class members. This warrants recusal pursuant to La. Code Civ. Proc. art. 151 B(4). It is noteworthy that this codal provision does *not* require a showing of bias or prejudice; indeed the status of the judge, his spouse, or relative as a putative class member is sufficient for recusal.

In discussing Article 151 B(4), the Supreme Court, in *In Re Cooks*, held that a judge's recusal is essentially mandated in the event that his spouse is a party, stating:

> Although the Article 151 B(4) says the judge 'may' be recused [where the judge is the spouse of a party], we can foresee no instances where a judge would not be required to recuse himself where he is the spouse of a party . . . in the cause.

In Re Cooks, 96-1147 (La. 5/20/97), 694 So. 2d 892, 903. The express language of the code article together with the interpreting jurisprudence as set forth in *In Re Cooks*, undoubtedly leads to the conclusion that **bias, prejudice and interest on the part of the judge are presumed where a spouse or other family member within the fourth degree is a party to the case**. As a result, La. Code Civ. Proc. art. 151 B(4) militates in favor of the recusal of this Court and Judge Reese from this proceeding.

At least two judges of the Civil District Court have recognized the inability of the CDC bench to preside over this hurricane litigation. In related flood litigation, *Brubbacher v. Board of Commissioners for the Orleans Levee District, et al.*, Civil District Court Docket No. 2006-9775, Judge Robin Giarrusso recused herself stating, "Since I am a potential plaintiff in this case, it would be inappropriate for me to be the judge in this matter."[11] An equally relevant example is an Order of Recusal issued by Judge Lloyd J. Medley, Jr. of the Civil District Court, Division D in which Judge Medley recused himself in a related

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[11] January 18, 2007 Order, attached to defendant's Fourth Circuit Writ Application as Exhibit "16."

case, reasoning: "The Judge is a putative class member in litigation involving one of these defendants."[12] Thus, Judge Medley recused himself because of class status in another action against the defendants. That this Court and Judge Reese are putative class members in the subject litigation presents a more compelling case for recusal.

c. Either Judge Bagneris or Judge Reese as presider would create the appearance of injustice.

At the very least, either judge, as a presiding judge for any stage of the litigation, would create the appearance of injustice which is prohibited by the Due Process Clause. The United States Supreme Court has made it clear that recusal on a Due Process violation need *not* be based on actual bias. "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, '**justice must satisfy the appearance of justice**.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825, 106 S. Ct. 1580, 1587, 89 L. Ed. 823 (1986) (emphasis added) (citing *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625).

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[12] March 5, 2007 Order of Recusal was attached as Exhibit "1" to defendant's Fourth Circuit Reply Brief in Support of Writ Application.

The case at bar represents a high profile case that potentially determines the legal issues for all claims against the OLD and other defendants regarding the failure of the levee systems during Hurricane Katrina. Never has the "appearance of justice" received greater scrutiny. More than 80% of the City of New Orleans was flooded by Hurricane Katrina. This lawsuits represents the extreme of all cases. Your Honor and Judge Reese sustained property damage as a result of the flooding, as evidenced by the previously referenced lawsuits. The Due Process Clause mandates recusal to maintain the "appearance of justice" and to afford the OLD an opportunity for a fair trial.

Moreover, it is the simple potential for bias that mandates recusal in this matter. It is the mere temptation to a judge to rule in favor of or against one party that tips the scales of justice and requires recusal. "A reasonable formulation of the issue is whether the 'situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822, 106 S. Ct. 1580, 1585, 89 L. Ed. 823 (1986) (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S. Ct. 80, 83, 34 L. Ed. 2d 267). Thus, in a situation in which the judge would be swayed to "not hold the balance nice, clear and true," the Due Process Clause demands recusal of that judge.

The case at bar presents just such a situation. Your Honor and Judge Reese suffered personal property damage from floodwaters, and each blames that damage on the OLD. The participation of any similarly situated taints the litigation from the very beginning. As Justice Brennan of the United States Supreme Court recognized in his concurring opinion to *Aetna Life Ins. Co.*, "[t]he participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process."[13]

In *Aetna Life Ins. Co. v. Lavoie*, the United States Supreme Court concluded that an Alabama Supreme Court Justice could not participate in the decision of the Court regarding penalties against an insurer for bad-faith, Justice Embry of the Alabama Supreme Court had pending a lawsuit against a different insurer, alleging bad faith. The United State Supreme Court held: "We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey, Murchison*, and *Ward*. We make clear that we are not required to decide whether in fact Justice Embry was influenced, but

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[13] *Aetna Life Ins. Co.*, 475 U.S. 813, 831, 106 S. Ct. 1580, 1590, 89 L. Ed. 2d 823 (Brennan, J. concurring) (emphasis in original).

only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825, 106 S. Ct. 1580, 1587, 89 L. Ed. 823 (1986) (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S. Ct. 80, 83, 34 L. Ed. 2d 267 (quoting *Tumey*, 273 U.S. at 532, 47 S. Ct. at 444)). The Court did not determine that Justice Embry had been influenced as it found that determination unnecessary. **The mere temptation to Justice Embry to rule against the insurer was sufficient to deprive the insurer of its Due Process rights.**

Certainly, the lawsuits flied by Your Honor and Judge Reese undeniably show that there exists pre-conceived opinions that the OLD was negligent and is responsible for the levee failures, Judges cannot preside over a matter which requires a determination of the exact same issues. The present case is the antithesis of "temptation" "not to hold the balance nice, clear and true." Your Honor and Judge Reese must be recused.

CONCLUSION

The Due Process Clause of the Fourteenth Amendment guarantees to every litigant the right to a fair trial and an impartial tribunal. These protections are so great that recusal is warranted to

prevent even the appearance of injustice. Recusal does not require actual bias.

Pre-judgment of the facts and pre-conceived notions of liability mandate recusal. The case at bar is a high profile class action seeking recovery for hurricane related damages. Your Honor and Judge Reese have filed lawsuits in the United States District Court against the OLD for property damage resulting from the flooding of the city. Neither judge can preside over the present litigation while maintaining the appearance of justice.

Additionally, both this Court and your wife, and Judge Reese, along with his wife and family members, are putative class members of the present litigation, thus mandating recusal. No judge should preside over a matter in which he, his spouse or a close family member within the fourth degree has a financial stake in the outcome. The Due Process Clause requires recusal of this Court and Judge Reese in this matter.

Accordingly, the OLD respectfully requests that this Court and/or Judge Reese be recused from this matter. Moreover, the OLD requests that this Court recuse itself and re-allot this matter so that the

Motion to Recuse can be heard as required by La. Code Civ. Proc. art. 154.

Respectfully submitted,

/s/ Thomas P. Anzelmo
Thomas P. Anzelmo, T.A. (#2533)
Mark E. Hanna (#19336)
Kyle P. Kirsch (#26363)
Andre J. Lagarde (#28649)
McCRANIE, SISTRUNK,
ANZELMO, HARDY,
MAXWELL & McDANIEL
3445 N. Causeway Boulevard,
Ste. 800
Metairie, LA 70002
TELEPHONE: (504) 831-0946
FACSIMILE: (504) 831-2492

And

James L. Pate #10333
Ben L. Mayeaux #19042
LABORDE & NEUNER
One Petroleum Center, Suite 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
TELEPHONE: (337) 237-7000
FACSIMILE: (337) 233-9450
Attorneys for
The Orleans Levee District

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been hand delivered to The Honorable Michael G. Bagneris.

The above and foregoing has also been served on all known counsel of record via either electronic transmission, fax, hand delivery and/or by mailing same to each, postage prepaid and properly addressed.

Metairie, Louisiana, this 19th day of May, 2008.

/s/ Thomas P. Anzelmo

CIVIL DISTRICT COURT

PARISH OF ORLEANS

STATE OF LOUISIANA

SUSAN and WILLIAM LAURENDINE, et al — NO. 05-11660

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS — DIVISION "L"

Proceedings held in the above-entitled and numbered cause, heard in Open Court, before the HONORABLE MICHAEL G. BAGNERIS, Judge Presiding, on the 21st day of May, 2008.

APPEARANCES:

DARLEEN M. JACOBS, ESQ.
Attorney for the Plaintiff

THOMAS P. ANZELMO, ESQ.
Attorney for The Board of Commissioners of the Orleans Levee District, Parish of Orleans

CHARLES M. LANIER, JR., ESQ.
Attorney for The Sewerage & Water Board of New Orleans

JOE HASSINGER, ESQ.
Attorney for State of Louisiana, Department of Transportation & Development

REPORTED BY:
LESLIE CALLAIS, C.C.R.
Official Court Reporter

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THE CLERK: The first matter on today's docket is Susan and William Laurendine, et al v. Board of Commissioners for the Orleans Levee District, Parish of Orleans, 05-11660.

MS. JACOBS: Darleen M. Jacobs in the Laurendine matter. We do have a temporary committee appointed that's not been appointed by the Court, but I represent the Plaintiff's management committee if, in fact, it's going to be appointed in the Laurendine matter.

MR. ANZELMO: Good morning, Your Honor. May it please the Court, Tommy Anzelmo representing the Orleans Levee District.

MR. LANIER: Charles Lanier on behalf of the Sewerage & Water Board of New Orleans.

MR. HASSINGER: Joe Hassinger representing the DOTD.

THE COURT: Let me ask you a question, Mr. Anzelmo, as we get started. What is scheduled today is a motion to recuse Judge Reese. If I appreciate your pleadings, you have also re-urged the motion to recuse me from re-hearing the recusal of Judge Reese. Is that correct?

[4] MR. ANZELMO: Mostly. Not re-hearing. From hearing. It's the original instance. From hearing –

THE COURT: Well, you did it once before.

MR. ANZELMO: Yes.

THE COURT: That's why I call it a re-hearing.

MR. ANZELMO: My distinction was because we never got there, there was nothing –

THE COURT: We did get there, as I appreciate it.

MR. ANZELMO: We only reached Your Honor's –

THE COURT: – recusal.

MR. ANZELMO: – recusal.

THE COURT: That's what I'm talking about.

MR. ANZELMO: Then we're good.

THE COURT: Let me try again.

MR. ANZELMO: We're good then. Then I agree with you. I withdraw any reservations. We're good.

THE COURT: [5] Let me make sure I understand what you just withdrew.

MR. ANZELMO: I withdrew my comments, Your Honor, that we weren't re-hearing something.

THE COURT: But you have re-urged the recusal of this judge?

MR. ANZELMO: Yes, Your Honor.

THE COURT: Now, clear something up for me. Now, I understand that the re-urging was done as a result of facts which occurred after my original hearing and after the Supreme Court had pronounced this ruling.

MR. ANZELMO: Correct.

THE COURT: And to be perfectly candid with you, I wasn't aware of my position until yesterday when I realized that part of the lawsuit that was filed in Federal Court included the Orleans Levee District.

MR. ANZELMO: And multiple other defendants.

THE COURT: Right. I was aware of the Corps of Engineers. I was not aware of who all was involved in the "et al" part of that litigation.

And let's assume for a moment that if [6] I had been allotted the case as the presiding judge, lets go on the assumption that, not based on the Code of Procedure but on the canons, I would have recused myself based on the canon which addresses itself to the appearance aspect.

MR. ANZELMO: 3(C).

THE COURT: Even if you make that assumption, why would that bar me from hearing the recusal of Judge Reese? So, to put it another way, since the only issue involved in the recusal of the judge is the judge's impartiality, which has nothing to do with the merits of that case, I'm looking to ascertain whether there are sufficient facts under the law to determine whether Judge Reese is capable of being impartial. Now, even assuming that I'm recusable as it relates to the merits of the case, how does that impact my ability to judge a judge's impartiality?

MR. ANZELMO: Would you mind if I grab that cup of water before I speak?

THE COURT: Absolutely not.

MS. JACOBS: May I just say something, Judge? I just was handed that this morning just minutes ago. So, I want the Court to know [7] that we were not served with it. He handed it to me.

MR. ANZELMO: As I explained to Ms. Jacobs, it was an error that I discovered last night that I had these recusal pleadings hand delivered to Mr. Gamble by mistake as opposed to Ms. Jacobs.

When I realized that, I called her last night, offered to drive them to her home, so we wouldn't have to present it this morning, and she said I could bring it to her this morning. But it was my error.

Back now to the direct question. It's our position, Your Honor, first of all, if you would have recused yourself, had you been the original trial judge in this case, recognizing that you could take no step in the proceeding, you would have recognized it on your own, based on the canons, that you shouldn't be involved in the case because you got a pending action against the Orleans Levee District, the appearance that it might create, that you are a putative class member of the action upon, which you would be asked to judge.

Now, Your Honor, in this particular case, taking the facts as they are, we know that you have sued my client. We know that you are a member of the putative class as it is stated right now. We know that under all of the steps that we would take to [8] review, should we have to bring a recusal against you if you were the judge originally, we know all the steps now under the due process test of the 14th Amendment, the steps in the Art. 151, and the canons, that we put all those together and suggest to you – not suggest – we state to Your Honor that you are prohibited from taking any step in these pleadings because while –

THE COURT: Any step in the proceedings. I don't have any problems with the merits itself in terms of those proceedings. I want you to get to –

MR. ANZELMO: But its the any step. This is a step in those proceedings. Because while you acknowledge, I believe, that you would be recusable, you would have recused yourself in the first instance, we say that you cannot take this step because decisions – You may make a decision that, Judge Reese, it's okay for Judge Reese to sit on this case. Because there is the appearance that you may make the decision that he's the right guy for the case, because it will benefit Your Honor, because you have a definite financial interest in the case, in the outcome of the case, the case that he's going to decide, the case in which you're a putative class member, Judge, I'm not [9] saying that you would make a decision based on that analysis, but you could make a decision.

As we set out in our brief, the United States Supreme Court, we're looking at an Alabama Supreme Court justice. He had a case against an insurance company that involved bad faith, but it wasn't even the insurance company that was in the case that he was going to be called upon to judge. And the Supreme Court said, no, that violates due process because it creates the appearance of the impropriety or the appearance that justice may not be partial.

We're talking now, Your Honor, the raw, the purest of justice that we can discuss, and that is because of all of the events that we know that have

happened here and that exists right now that not only should – It wouldn't make any difference if it was another judge that was up there. Any judge who's filed a suit against my client who's going to take a step that's going to make a decision that can affect my client such as whether a judge should be recused directly impacts upon me and implicates every argument that we've made about due process, Art. 151 recusal, and the judicial canons.

THE COURT: You missed my point. I mean, not missed my point. You missed the basis for [10] which I said I would recuse, I would recuse based on the appearance component, not because there was any violation of 151 in terms of a bias or prejudice on my part. But I understand how a reasonable mind could conclude what you just articulated. And that's me.

And under the canons, which is what I said I would do, under the canons, there are only two entities that can do that: me and the Supreme Court, because they're the final adjudicator of the canons.

But as it relates to my making a decision, having nothing to do with the merits of the case, this doesn't have to be this case that were talking about, I'm making a decision as to whether Judge Reese is capable of being impartial. Now, if there is some basis that you can demonstrate based on 151 that he is incapable of being impartial based on the Code, then my duty is clear. If there is a canon situation, then I can make a recommendation, but not a determination, because

the canons is something the judge him or herself has to determine as to whether that appearance exists. And if they make the wrong call, then the Supreme Court will tell them that they made the wrong call as was done in the In Re Cooks matter.

So, even assuming everything that you [11] assumed as it relates to this judge, I'm still not seeing how that impacts my ability to ascertain whether Judge Reese is impartial or not, unless you're telling me that the appearance that exists as it relates to the merits of the case also flows over to a determination of impartiality.

MR. ANZELMO: The last thing that you said is certainly a part of my argument and it was encompassed in what I said earlier. When I was responding to Your Honor, I understood the narrowness of what you said about Canon 3(C) and your determination. But in response to your question as to why you should not act, I explained all of the reasons why I felt that you should not act.

And I'm going to take it down even further. Your Honor and your wife have sued my client; Judge Reese and his wife have sued my client on the identical basis.

THE COURT: Stop. Stop right there. Then assuming, because that's not evidence in this matter as of yet because we haven't heard that, but assuming that what you just said is correct and I have already stated what I would do.

MR. ANZELMO: Yes, Your Honor, I would expect – That's why I put in my motion, Your Honor, [12] that should we choose to go forward, I put in the renewed motion, the new motion, all of the reasons why Judge Reese should be recused. And I'm almost expecting that if Judge Reese would come here and maybe he missed, as you did, that he had sued the Orleans – that his wife and I believe it's his kids had sued the Orleans Levee District, that under 3(C) of the canons, he recuses himself.

But short of that, Your Honor, in the purest form of how we would consider the question of impartiality and the appearance of the appropriateness of your actions and reserving my argument, because Your Honor has made this a pure bias analysis, and we respectfully disagree that it's not a pure bias analysis because we've argued, as we did before, that under Art. 151(B)(4), there is no prejudice or bias component in it. That is, it says the judge should recuse –

THE COURT: I usually have it out here.

MR. ANZELMO: Your Honor, I forgot to bring it and one of my esteemed colleagues brought it to me. Here it is.

Your Honor, the dichotomy that I'm drawing is if you look at 151(B)(4), there is no component of bias or prejudice. 151(B)(5) inserts bias, prejudice, interest [13] in the outcome. That's (B)(5). (B)(4) does not have that component to it. And that's why the Supreme – I'll let you read it.

THE COURT: Okay.

MR. ANZELMO: The Supreme Court addressed just that discrete issue concerning the –

THE COURT: You just say that because (B)(4), if you read just the appropriate parts, it says, "The judge of any court may be recused when he is the spouse of a party."

MS. JACOBS: May.

THE COURT: I got the "may." "May be recused when he is the spouse of a party."

MR. ANZELMO: *In Re Cooks*, Your Honor, made that a "shall."

THE COURT: I'm sorry?

MR. ANZELMO: *In Re Cooks* made that a "shall".

THE COURT: No. *In Re Cooks*, without having –

MR. ANZELMO: Can I read the part? It might be helpful to us, Your Honor.

In discussing Art. 151(B)(4), the [14] Supreme Court, in *In Re Cooks*, held that a judge's recusal is essentially mandated in the event that his spouse is a party, stating, "Although 151(B)(4) says the judge may be recused where the judge is the spouse of a party, we can foresee no instances where a judge

would not be required to recuse himself where he is the spouse of a party in the cause."

To me they've inserted the "shall" component. I mean, you can read the decision in total, but –

THE COURT: And this is the 2008 edition, and it still has the word "may". And the Supreme Court allowed the door open, because they said that they could envision no circumstance, but that doesn't mean that there isn't one. In the event that one is presented, they want to be able to seize upon those facts.

MR. ANZELMO: Well, Your Honor, it says, "We can foresee no instances."

THE COURT: It still hasn't been changed.

MR. ANZELMO: Yes, Your Honor, I will not dispute that.

THE COURT: And the legislature can easily take out "may" and insert "shall". They haven't [15] done that.

But be that as it may, I think that's even a stronger argument when you read that coupled with Canon 3(C) that we go back to the appearance component which, again, if I state on the record what I would do as it relates to if I had this matter as the presiding judge, if it was allotted to me, I will tell you, based on Canon 3(C), I would recuse myself if there was a motion to recuse to get rid of the appearance.

Now, that's me. I don't see how that impacts my ability to determine whether a judge, who right now I just have allegations as to why he should be recused, and that's why there would be a hearing as to whether or not that party should be recused, I don't see how I would be subjected to any one of the articles under 151 or any of the canons as it relates to my ability to determine the impartiality of a judge in a case.

MR. ANZELMO: Thank you, Your Honor. And I see my arguments are unpersuasive.

I will close by saying this. In this particular factual situation both Your Honor and his wife, and Judge Reese and his wife, have brought claims against my client.

THE COURT: Have we determined that is a fact? I [16] see your opposing counsel. It's an allegation.

MR. ANZELMO: I think it's a little more than an allegation, Your Honor, when I enclosed the exhibits which presented Your Honor the copy of the lawsuits in the re-urged motion to recuse Your Honor. I mean, the Code of Civil Procedure would be such that – and I think you earlier mentioned this – that if I present good grounds –

THE COURT: It's a supported allegation. But what if the judge came in and said, "Oh, I was unaware of that and I dismissed that"? I haven't said he has. But I'm saying we have to adduce the facts.

And if he hasn't, counsel, I don't know how else to say it except to say if he hasn't, I think that there's a strong –

MR. ANZELMO: Yes, Your Honor.

THE COURT: – there's a strong case that has been presented.

MR. ANZELMO: And thank you, Your Honor. If you wouldn't mind, insofar as this aspect of the motion that I've made directed toward the particular recusal of Your Honor from taking any steps today, what I'd like to do, in consideration of what Your Honor [17] said, if I could offer, introduce, and file into the record a copy of my latest motion with all exhibits attached, so that my record would be complete insofar as the basis upon which I moved that Your Honor should not take any further steps.

Unless Your Honor has any additional questions, I'll be glad to re-urge, in essence, reiterate what I've put in my motion as to what I feel are the bases, again, under the Code of Civil Procedure the due process requirements of the 14th Amendment and the judicial canons as to why Your Honor should not take any steps in this proceeding today. Thank you very much, Your Honor.

MS. JACOBS: May it please the Court, Your Honor, Darleen Jacobs in the Laurendine case. I'm pleased to be representing my sister and other people, including Bob Harvey's wife and other people in there.

This is the same song and dance that counsel had in Federal Court before Judge Duval in order to get a delay. Danced all around the Federal Court. Judge Duval didn't buy it and he didn't recuse himself and now he's presiding over the levee cases.

Its been almost three years. And every time a judge gets the levee case, they file a motion to recuse because they [18] know it's going to be another delay. That's unconscionable for the citizens of this area to have to wait that long. We have to have this issue resolved, and it should be resolved fast, not only for the Plaintiffs, but you got a team of defense lawyers out here who have their staffs here ready to get started and start taking depositions in this case.

Now, once again, he brings up the song and dance, and I'm just hearing this, this morning, that Your Honor should be recused. First of all, Your Honor, as I recall, on the pleadings that they gave me right now filed the case in Federal Court which mainly targets the Corps of Engineers, not the Levee Board.

And all you're doing right now is ruling on whether or not Judge Reese can be fair. That's all you're going to rule on. And to me that's not a very hard thing to do, because we all know Judge Reese. And I can tell you he's as evenhanded as any judge up here. Nevertheless, I had subpoenaed Judge Reese for this hearing, and I understand that he's waiting to be called from Your Honor so that we can question him on his fairness.

I would like to point out to the Court that Art. 151 requires a finding of actual bias or prejudice, even the substantial appearance of the possibility of bias, or [19] the mere appearance of inappropriateness are not causes for removal of a judge from presiding in the case.

And you're not going to preside in the case in chief. You're only going to decide whether or not Judge Reese can be fair, as I understand it.

The *Edwards v. Daugherty* case which I've cited in my memorandum has been quoted ad nauseam in recusal motions. Bias, prejudice, or personal interest to warrant recusal must be of a substantial nature, and based on more than conclusionary allegations, according to the *Augman v. City of Morgan City*.

You're not going to be a witness in this case. We already have a list of Plaintiffs who we hope will be selected as bellwethers. Neither will Judge Reese or his wife and your wife will not be a witness in this case. You will not participate in this case. You won't even testify. You won't call witnesses in the case, neither will Judge Reese. And it's a jury case. So, the only thing a presiding judge is going to do is really rule on the admissibility of evidence, and, frankly, most of that's been ruled on by Judge Duval. We've trying aspects of this case in Federal Court.

THE COURT: How would you respond to this [20] question, Ms. Jacobs? Even if – and I'll use me, because I've already said what I would do – even though I would not be called as a witness, since I am

a party, haven't I already made a determination of the merits of my position since I am a party in the case?

MS. JACOBS: I don't believe you have. You haven't filed in Civil District Court to my knowledge. You have filed in Federal Court.

THE COURT: No, I have not filed in Civil District Court. But the allegations that are raised in the federal claim are I won't say identical but they're extremely similar to the allegations raised in Civil District Court.

MS. JACOBS: But you're not being asked to rule on allegations. You're being asked to rule on whether or not a judge is biased or not biased.

THE COURT: No. I was talking about in terms of the presiding judge.

MS. JACOBS: If you were the presiding judge, then I'm sure I would have some questions for you, just as I'm going to have for Judge Reese shortly under direct examination. [21] You want my own opinion? Yes, I think you could be fair. Could you handle the case? Yes.

And I'm going back to Judge Levy, and I hate to bring up my poor husband that I dearly loved, but I have to tell you he was a judge and I was a trial lawyer. I sued Allstate and all these people over and over again. The community benefited from him. He never recused himself from those cases. And ironically lawyers never wanted him to recuse himself

from those cases. And he was always fair. Nobody ever said Judge Levy was not fair. They may have said he was old, but they never said he was not fair.

THE COURT: And I agree with you on that point. I think I could be, too, which is why I said I would recuse myself based on Canon 3(C) because I can see why reasonable minds would come to the conclusion based on the appearance of impropriety.

But at any rate, I am going to rule that my determining whether or not Judge Reese has the ability to be impartial in this case is something that is totally separate and distinct from making any kind of conclusions or statements as it relates to the merits of the case. I'm simply determining whether or not a presiding judge is in violation of any of the [22] provisions of Art. 151.

MS. JACOBS: Yes, Your Honor. So, you're going to go forward with the hearing?

THE COURT: So, we're going to go forward with the hearing on Judge Reese.

MS. JACOBS: Your Honor, he has been subpoenaed, and I think he's waiting on a courtesy call from the Court, at the pleasure of the Court, if you want to call him. Can we take a two-minute recess?

THE COURT: And you may submit, counsel, whatever it was that you have.

MR. ANZELMO: Yes, Your Honor. That's what I was going to ask you to do, whether those exhibits would be deemed admitted.

THE COURT: We're a Court of record.

(At this time, a short recess was held.)

HON. KERN ANTHONY REESE, XXXX XXXXXXXX XXXXX, New Orleans, Louisiana; after having been called to the stand and sworn by the Court, was examined and testified as follows:

MS. JACOBS: It's counsel's motion. So, I think he has to start with the examination.

[23] EXAMINATION

BY MR. ANZELMO:

Q Judge, would you like some water? You're not going to be up there, I believe, that long, but in case you wanted some before we got started.

A I'm fine. Thank you.

Q Judge, would you please state your full name and address for the record.

A Kern Anthony Reese, XXXX XXXXXXXX XXXXX, New Orleans, Louisiana 70122.

Q Judge, I'm Tommy Anzelmo representing the Orleans Levee District. I have some questions to ask you in connection with the matter that's presently

before the Court. Judge, on August 29, 2005, where was your residence?

A I was living at XXXX XXXXX XXXXXXXXX, New Orleans, Louisiana.

Q Judge, is that address close to Bayou St. John?

A It's about two blocks from there.

Q You would be geographically between the eastern edge of Bayou St. John and the western side of the London Avenue Canal in the City of New Orleans?

A Yes.

Q In August of '05, I believe that you were married to Dorothy?

A That's correct.

Q There were two gentlemen who filed suit in Federal Court. One was named Justin and was named Jared, and they both listed in their papers as living at XXXX XXXXX XXXXXXXXX. Are they your children?

A Yes, they are.

Q Were they minors or adults in August of '05?

[24] A Both adults.

Q Your Honor, were you aware that a lawsuit had been filed on behalf of your wife and on behalf of

a Justin and Jared in the United States District Court for the Eastern District of Louisiana naming, among others, as Defendants the United States of America and the Board of Commissioners of the Orleans Levee District?

A Yes, I was aware that they had filed suits.

Q And, Your Honor, did you read the lawsuits prior to there [sic] being filed?

A No.

Q When was the first time that you became aware that your wife and your two sons had filed a suit against the Orleans Levee District in Federal Court?

A Well, they received copies of the suits after they were filed. At that point I realized that they had filed the suits. They had told me they were planning on doing it.

Q And those suits, at least the one that was filed by your wife, I believe bears a date stamp of August 29, 2007, and the ones for Jared and Justin both bear that same date. So, it would have been some time thereafter that you became aware of that?

A Correct.

Q Judge, I assume that you are aware that you are presently the trial judge in the action that we're here about today, Susan and William Laurendine, et al v. The Levee District, et al, Docket No. 05-11660; is that correct?

A Correct.

Q Your Honor, were you also aware that your wife [25] had filed a suit against Allstate Insurance Company, Civil Action No. 06-4873, which was filed August 28, 2006, in the United States District over the Eastern District of Louisiana?

MS. JACOBS: Objection. It's totally irrelevant, Your Honor, for this hearing.

THE COURT: What's the relevancy?

MR. ANZELMO: Your Honor, if you could permit me, I'll make it clear. Well, I'll state it now. Contained within that lawsuit there were three personal property inventory forms describing contents lost, all signed by Judge Reese claiming that he was damaged, lost contents, lost value as a result of floodwaters experienced during Hurricane Katrina.

THE COURT: What's that got to do with his Orleans Levee District matter?

MR. ANZELMO: What I'm establishing is that Judge Reese by what's in these pleadings has a pecuniary interest in the outcome of the Laurendine case in which he is a putative class member based upon his address and the allegations of the Laurendine case.

THE COURT: I'm going to allow it. Go on.

MS. JACOBS: [26] Will the Court note my objection?

It's Allstate Insurance Company.

THE COURT: Yes, it's already noted. That's why we got a court reporter. Let's go.

A I'll answer the question. Yes, I'm familiar with the lawsuit. My wife is the named insured on that policy. I assisted her in preparing the contents list. She also received the proceeds from the lawsuit.

MR. ANZELMO: Judge, can I approach the witness?

THE COURT: Yes, you may.

MS. JACOBS: He just said he helped her prepare it. What do you want to do that for? He's already answered that question. Go ahead if the Court wants to let you do it. I object. I think it's irrelevant.

BY MR. ANZELMO:

Q Judge Reese, in connection Civil Action No. 06-4873, this is the suit by your wife versus Allstate Insurance Company. I'm going to show you the first page.

MS. JACOBS: Your Honor, can I make my objections continuing? Because I would object to the entire proceeding with Allstate.

THE COURT: So noted. All questions related to Allstate is objected to by opposing [27] counsel. Go ahead.

BY MR. ANZELMO:

Q Judge Reese, would you have signed each one of the pages?

A Oh, yes, that's my signature.

Q Judge Reese, would it be a fair statement to say that in connection with the allegations that are in the federal lawsuits that were filed by your wife and your children that they claimed that they suffered property damage, whether real property or contents damage, as a result of the failure of the 17th Street and London Avenue Canals?

A I think those allegations were made in that lawsuit.

Q In connection those allegations, do you believe that at the time that your wife and children filed those lawsuits in Federal Court against the Orleans Levee District that they believed that the Orleans Levee District was responsible for their damages?

MS. JACOBS: Objection. How would he know? He's not a party to that lawsuit. Unless he's in their mind. They're independent people, Your Honor.

MR. ANZELMO: Your Honor, he said he read the lawsuits.

MS. JACOBS: But he doesn't know what's in their minds.

MR. ANZELMO: Well, he may know what's in their [28] minds.

MR. JACOBS: No.

THE COURT: Y'all me to rule or do you want to have a debate?

MS. JACOBS: We want the Court to rule, Your Honor.

THE COURT: I'm going to sustain the objection. Lay a foundation, counsel.

BY MR. ANZELMO:

Q Judge Reese, did you discuss with your wife and your children the nature of their allegations against the Orleans Levee District?

A My discussion with my wife and my children regarding their respective claims is that if we wanted to file a lawsuit, they could choose to do that. They're all adults.

Q And did you understand that within those allegations that they believed they were claiming that the Orleans Levee District was responsible for their damages?

A My son was a first-year law student completing one week of law school – Well, after that. He was a second-year law student at that point, I guess. My wife and the youngest son has no legal training at all.

MS. JACOBS: Your Honor, I object. I do. But I have to make an objection on the grounds of relevancy. What they may have thought is [29] irrelevant.

THE COURT: You can't object to the witness responding to a question.

MS. JACOBS: I object to the question, Your Honor.

THE COURT: The objection is overruled. Go on, Judge.

A They wanted to file a suit. I told them do what's in your best interest.

BY MR. ANZELMO:

Q And in connection with those lawsuits, they understood and you understood through conversations with them about this that –

A No. They had discussions with the attorneys they engaged, and decided who they wanted to sue. I didn't counsel them on that.

MS. JACOBS: I have another objection. And I apologize, Judge Reese, to have to make the objection. What they understood, only they can say what they understood. You can ask Judge Reese –

THE COURT: Then you object to the form of the question?

MS. JACOBS: Yes, Your Honor.

THE COURT: Then that objection is sustained. We're going to object and then we'll go [30] from there. I don't need editorials.

BY MR. ANZELMO:

Q Judge Reese, as we sit here today, you are aware that your spouse, your wife, and your two adult children have sued the Orleans Levee District claiming that they were damaged as a result of failures of the 17th Street and London Avenue Canal; is that a fair statement?

A Well, that's what's contained in the lawsuit. At the time the suits were filed, I thought they were suing the Corps of Engineers. I didn't know.

Q But you do know now; is that a fair statement?

A Sure.

THE COURT: Just for the record, as I indicated, I learned about the Orleans Levee District, being a party to the lawsuit that my wife and I are involved in, yesterday, which I stated earlier. Go ahead.

BY MR. ANZELMO:

Q Judge Reese, are you familiar with the allegations as they have been stated in the Laurendine matter which is –

A I read that petition, absolutely.

Q In connection with that petition, would it be a fair statement to say that it describes the putative class as being those residents and property owners within Orleans Parish for sure and parts of Jefferson

Parish who suffered damages as a result of failures of the 17th Street and London Avenue Canals?

A Uh-huh.

Q Would you agree that within the geographical [31] area that has described the class, that at the time of Katrina the location of your home and where your spouse and sons were living was within that geographic boundary?

A Uh-huh. Yes.

Q I lost my train of thought. Forgive me.

A You asked me about whether they were within the geographic boundaries between the 17th Street Canal and the London Avenue Canal.

Q Would you agree, as the Laurendine petition is stated, that currently they are putative members of that class by geographical location?

A Well, I might disagree –

MS. JACOBS: Excuse me, Your Honor. May I interpose an objection? That case has not been certified as a class action yet. We prayed for it, but it hadn't been certified. Right now the only Plaintiffs before the Court are those that are named in the petition.

MR. ANZELMO: And, Your Honor, that's why I said based upon the allegations. I understand there has been no class certified. But just based upon what we have right now.

MS. JACOBS: Object to skepticism.

THE COURT: I sustain that. Rephrase the question. Potential.

BY MR. ANZELMO:

[32] Q Judge Reese, based upon the allegations in the Laurendine complaint and the location of where your home and your wife's home and your children's home was located, they are potential members of the putative class as stated in the Laurendine petition?

A Potentially, yes, I could imagine that they could be.

Q Judge Reese, are you aware that the allegations in the federal lawsuits that have been brought by your wife and children, in essence, contain the same allegations in the Laurendine petition relative to damages sustained by potential members of the putative class within the geographical area as described in Laurendine?

A I don't know if I agree with that.

Q And what's the basis of the disagreement?

A I really don't remember what's in their petitions, because I glanced at it but I didn't read it and it's been awhile. I got a copy of it with the information received on this motion, as well as a subpoena. But, again, I read that a couple of days ago. And I'm just finishing a seven-day jury trial. So, my brain is a little fried.

MR. ANZELMO: Judge Bagneris, may I approach the witness?

THE COURT: You may.

BY MR. ANZELMO:

Q Judge Reese, I'm going to show you Exhibit 2 to my motion, the current motion. It's Civil Action 07-4999 entitled Dorothy Reese v. several defendants, [33] including the Orleans Levee District. And I'm going to ask if you would confirm for me that Paragraph 2 of that complaint indicates that your wife owned and resided at the property located at XXXX XXXXX XXXXXXXXX, on August 29th, when the Orleans levee system failed, particularly 17th Street, London Avenue, and Orleans Canals?

A I mean, that's what the document says. Now, if you ask me if that's where my wife resided and did she own the property, yes, she did.

Q I'm going to show you on Page 28 of the complaint Count 1. It provides negligence of Defendants in the dredging of the 17th Street Canal. Do you see that, sir?

A Yes, I do.

Q And Paragraph 88, does it not provide as a direct and proximate result of the negligence of the Corps, OLD, Orleans Levee District, and others in the dredging of the 17th Street Canal, that she suffered extensive damage including, but not limited to, loss of property, both movable and immovable, diminution of

property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorney fees, and other special damages to be proven at trial?

A That's what the document says.

Q Judge Bagneris, insofar as Count 3 is concerned at Page 31, this asserts the negligence of the Defendants in the design, construction, and maintenance of the London Avenue Canal, levees, and floodwalls, and –

THE COURT: [34] Did you mean to say Judge Bagneris just now?

MS. JACOBS: He did say that, Judge.

MR. ANZELMO: I meant to say Judge Reese.

THE WITNESS: I'm sorry. What's your question?

BY MR. ANZELMO:

Q And at Paragraph 102 of Count 3, does it not provide as a direct and proximate result of the negligence of the Corps, OLD, and others in the design, construction, and maintenance of the London Avenue Canal, that Plaintiff suffered extensive damage including, but not limited to, in essence, makes the same recitation?

A That's what the document says, I agree.

MS. JACOBS: Your Honor, are we going to read the entire lawsuit? I'm going to object to that.

THE COURT: No. I think we got two more tabs to go.

BY MR. ANZELMO:

Q Count 4 deals with the negligence of the Defendants in the construction and maintenance of Orleans Avenue Canals, levees, and floodwalls; correct?

A Correct.

Q And there are other counts claiming liability against the Orleans Levee District dealing with, Page [35] 35, strict liability?

A Yes.

Q Nuisance on Page 36, Count 6?

A Yes.

Q And in the prayer for relief the prayer asks that the Defendants be held liable for her damages or Plaintiff's damages as a result of Subparagraph 2, the design, construction, and maintenance of the 17th Street Canal; Subparagraph 3, for the negligence and design, construction, and maintenance of the London Avenue Canal.

A Okay.

Q Judge Reese, in connection with the lawsuits filed by Justin and Jared, Justin's lawsuit, one of

them is 07-5148, my Exhibit 4, and Jared, Civil Action No. 07-5150, my Exhibit 5. Having reviewed those at some time in the past, do you understand that the allegations are basically identical to what's in your wife's suit?

A I'm sure they're consistent.

Q And, Judge Reese, would it be a fair statement to say that insofar as the allegations of the Laurendine case, that those allegations deal with the claims of negligence by members of the potential putative class, that the Orleans Levee District as one Defendant is liable for damages as a result of design, construction, and maintenance of the 17th Street and London Avenue Canals?

A I think those allegations are contained therein. But by way of explaining my answer, Mr. Anzelmo, the operative word is potential putative members. And since they have indeed filed lawsuits [36] in Federal Court and, as I understand it, the Corps of Engineers has already been granted immunity, I don't know the status of those lawsuits. I think it's been appealed to the Fifth Circuit. And they have the opportunity to opt out of any class action because they have their own lawsuits. Consequently, I don't know if –

MS. JACOBS: Your Honor, for a point of information, you cannot have a class action against the Corps of Engineers. It's prohibited by law. That is the law. Since I'm in those cases.

MR. ANZELMO: I should now say –

THE WITNESS: I'm talking about the suits in Federal Court.

THE COURT: It's the Court's appreciation there's not been a class certified, but there has been a ruling that the Corps of Engineers is immuned, and that's subject to –

MS. JACOBS: – being dismissed.

THE COURT: Now, that is not in concrete. Because, like so many things, so many litigation subsequent to Katrina, it is not final until the Supreme Court has spoken on the issue, and to my knowledge that hasn't happened yet.

[37] MR. ANZELMO: And if Your Honor is taking judicial notice of the dismissal of the United States of America from the levee litigation, the Court should also take judicial notice of the fact that the Orleans Levee District has not been dismissed, and those actions against the Orleans Levee District and other Defendants –

THE COURT: Are pending.

MR. ANZELMO: – are proceeding.

THE COURT: Right.

MR. ANZELMO: Which is part of the reason why those lawsuits will remain viable, potentially remain viable against the Orleans Levee District,

because there were other Defendants named in these lawsuits, all of which I have not named.

At this time, Your Honor, I'd like to offer, introduce, and file into evidence the complaint filed by Dorothy Reese, Civil Action No. 07-4999, which is identified in my papers as Exhibit 2; the lawsuit, Civil Action No. 06-4873, Dorothy Reese v. Allstate; Civil Action No. 07-5148, Justin Reese v. Orleans Levee District and others; and Jared Reese, Civil Action No. 07-5150.

[38] THE COURT: All that is Exhibit 2?

THE WITNESS: I guess it's en globo.

MR. ANZELMO: No, Your Honor, Forgive me. Exhibit 2 was the original Dorothy Reese, Exhibit 3 is Dorothy Reese v. Allstate. Exhibit 4 is Justin Reese v. United States of America. Exhibit 5 is Jared Reese.

BY MR. ANZELMO:

Q Judge Reese, the home at XXXX XXXXX XXXXXXXXX –

A Forty-six.

Q XXXX XXXXX XXXXXXXXX, was that property owned by you and your wife?

A No,

Q Separate property?

A Her separate property.

Q No community asset there?

A No.

Q In connection with your residence at XXXX XXXXX XXXXXXXXX, did you have personal property within that house owned by you or a community asset that was destroyed as a result of the flooding that occurred during Hurricane Katrina?

A My wife and I had no community. My property was upstairs in the second floor closet and in the study.

Q The furniture items on the first floor of your home, was any of that community property?

A I'm sure you've heard the old maxim with your [39] spouse. What's yours is mine; what's mine is mine. My wife is a firm believer in that.

Q Yes, Your Honor, and I thank you for that answer. But notwithstanding what she believed, did you own some of that property that was on the first floor that was inundated by the floodwaters?

A I think I lost some cassette tapes.

Q Your Honor, in connection –

THE COURT: The only thing we have is CDs, cassettes, and albums.

THE WITNESS: My albums were on the second floor. So, I didn't lose those.

BY MR. ANZELMO:

Q Judge Reese, in connection with the flooding which was experienced at your residence, did you experience mental anguish and/or inconvenience as a result of being displaced from your home?

A Yes, honestly, I did.

Q And, Judge, how long were you away from your home as a result of the floodwaters?

A About a year and a half.

Q I believe that you and your wife were required to purchase a new home in Baton Rouge as a result of that?

A We did.

Q That particular home, both you and your wife are listed as co-owners of that property; is that fair?

A That's correct.

Q And, so, you had to personally pay money to [40] acquire a second home as a result of your inability to live at your home at XXXX XXXXX XXXXXXXXX as a result of the flooding; is that a fair statement?

A Myself, my cousin, my mother, my son, my stepfather, a couple of friends, a couple of relatives, other relatives.

Q Your Honor, did they all contribute monies to that?

A Oh, yes, absolutely.

Q And, Judge, all those individuals that you mentioned, all of those relatives, were they living in Orleans Parish at the time of Hurricane Katrina?

MS. JACOBS: Objection.

THE COURT: Overruled. Go ahead. You can answer.

A My mother, my stepfather, my cousin. My son, he was living uptown. He was close to the river. He didn't have any flooding problem. My aunt and my uncle were living in New Orleans East. That's outside of the jurisdiction. That's a different lawsuit, I think.

BY MR. ANZELMO:

Q But within the geographical area of the Laurendine case, would it be a fair statement to say that you had relatives within the fourth degree –

A Sure.

Q Let me get the whole question out, Your Honor. – who suffered damages as a result of flooding due to the breaches in the London Avenue and the 17th Street Avenue Canal?

A Yes.

[41] Q Judge Reese, would you agree that a party, a reasonable person, might conclude that if they saw that you were being called upon to judge a case where you were the judge of the case and that

family members, including your spouse, were also members of the case, potential members of the case, and were also suing the same defendant, that that would create an appearance of partiality?

MS. JACOBS: Objection.

THE COURT: What's the objection?

MS. JACOBS: The objection is which reasonable person? How would he know? Is he all knowing? Does he know what everybody would think?

THE COURT: It's a reasonable person standard that everybody in this courtroom uses all the time. Objection overruled. You can answer the question.

A Mr. Anzelmo, what other people think is their conclusions to draw. My conclusions to draw is that I was elected by the people of Orleans Parish to do a job and to do it right and to do it fair and to look at the evidence presented and to rule accordingly. I don't shirk my responsibility; I don't run away from it.

BY MR. ANZELMO:

Q Thank you, Your Honor. Were you finished?

A No. Let me say to you if I felt that I could [42] not do this fairly and objectively, I would recuse myself.

Q Insofar as your personal analysis, and no disrespect intended, insofar as Judicial Canon 3(C), do you believe that under the tenants [sic] of that

canon that a reasonable person might see that if there is a judge in a case whose wife is suing the same defendant who is the subject of the original case, that that person might believe that the judge's impartiality might be reasonably questioned?

MS. JACOBS: Objection, Your Honor.

THE COURT: Asked and answered. Sustained.

BY MR. ANZELMO:

Q Judge Reese, how many feet of floodwater did you have in your home?

A About five and a half. And I assume you're talking about on XXXXX XXXXXXXXX?

Q Yes.

A Yes. That's where my wife was letting me live.

Q Judge Reese, do you understand, as you sit here today, that you know that your wife is suing and children are suing the Orleans Levee District –

MS. JACOBS: Object. It's already been established, Your Honor.

THE COURT: That's harmless. Go ahead.

THE WITNESS: Again –

BY MR. ANZELMO:

[43] Q I wasn't finished, Your Honor. Please forgive me. I shouldn't have paused.

Your wife and children are suing the Orleans Levee District, and that you've been asked or assigned the Laurendine case in which the Orleans Levee District is a defendant?

A I want to make sure I understand your question. If there's a class certified, potentially they could be. That hasn't happened. They're not parties to the suit. So, I guess, potentially, I guess we all have potential. It could be a lot things. But the actuality on balance at this point is no.

Q You said they're not parties to the lawsuit. But you do agree that they fall within the geographical area that would – right now they are potential putative members of that class as it is described in Laurendine?

MS. JACOBS: I object. It hasn't been certified as a class. The definition hasn't been established. That has to be established after a hearing. I mean, this is all speculation, Your Honor.

THE COURT: Objection overruled. That's why the term was potential, a potential member.

A I imagine they are.

BY MR. ANZELMO:

Q Judge Reese, would you agree that in the Laurendine case that you will ultimately be the decider of whether or not this class is certified and the geographical boundaries of the class?

[44] A If I am not recused, I imagine I would be.

Q So, that's a yes, you agree?

A I think that's a yes.

MR. ANZELMO: Thank you very much, Your Honor. That's all the questions I have at this time.

EXAMINATION

BY MS. JACOBS:

Q Good morning, Your Honor.

A Good morning.

Q I know you're probably sick of seeing me anyway for awhile.

A No, absolutely not.

THE COURT: You were part of that seven-day trial?

MS. JACOBS: I was, Judge. Happy to be part of that seven-day trial.

THE WITNESS: Ms. Jacobs did a very commendable job.

MS. JACOBS: Thank you, Your Honor.

THE COURT: Well, that means that the jury has come back.

MS. JACOBS: The Civil District Court juries are back; New Orleans is coming back, Your Honor.

BY MS. JACOBS:

Q Judge, you personally have not filed a lawsuit [45] against the Orleans Levee Board; is that correct?

A No, I have not.

Q And neither you nor your wife are plaintiffs in the Laurendine case?

A No, we are not.

Q And neither you nor any relatives are named plaintiffs in that case?

A That's correct.

Q And to your knowledge that Laurendine case has not been certified as a class?

A No, ma'am.

Q Now, you do realize that the Laurendine case has requested a jury?

A Yes, I am.

Q And do you feel that you can be fair and empanel a jury and let them be fair to the final outcome of this case?

MR. ANZELMO: Objection to the form of the question. That's a standard to be decided by the Court.

THE COURT: I'm sorry. Could he be fair?

MS. JACOBS: Fair and impartial.

THE COURT: You object to the form of that question?

MR. ANZELMO: Because its incomplete based upon the basis upon which we brought our motion. That includes one element of it, but it's [46] not –

THE COURT: Objection overruled.

BY MS. JACOBS:

Q You feel you can be fair and impartial?

A Absolutely.

Q You've tried many jury cases since you've been been on the bench; is that correct?

A Yes.

Q And when you became a judge, didn't you take an oath; wasn't an oath required?

A Absolutely.

Q And did that oath require that you state that you could be fair and impartial, and judge cases based upon the sworn testimony and evidence that's presented before you?

A Yes, ma'am.

Q And do you feel you could do that in the Laurendine case?

A Yes, I can.

Q Now, with regard to the lawsuits that have been filed in Federal Court, you are aware of the fact that there was a deadline to file against the Army Corps of Engineers and if someone didn't file, they were out?

A Yes, ma'am.

Q Are you also aware of the fact that with regard to the Army Corps of Engineers you cannot have a class action?

A Yes.

MR. ANZELMO: Objection.

[47] BY MS. JACOBS:

Q In that case or the MR-GO case?

MR. ANZELMO: Objection to relevance.

A Well, I know that.

BY MS. JACOBS:

Q And you are aware that in no area in Federal Court or State Court regarding the Orleans Levee District or the MR-GO or the Army Corps of Engineers has the case been certified as a class?

MR. ANZELMO: Objection to relevance.

THE COURT: Overruled.

A Not to my knowledge.

MS. JACOBS: Thank you, Your Honor.

EXAMINATION

BY MR. ANZELMO:

Q Judge Reese, you were asked questions about the taking of your oath?

A Yes.

Q Did that oath include that you would follow the judicial canons, as well as the articles of the Code of Civil Procedure?

A Absolutely.

Q And, Judge Reese, insofar as the residence that you maintain or maintained in August of 2005, were you benefiting from the fact that your wife owned the house and let you live there?

MS. JACOBS: Object. I never went into that on [48] cross.

THE COURT: Sustained.

MR. ANZELMO: That's all the questions I have, Your Honor.

THE WITNESS: I'm done?

THE COURT: You're done. We'll have a decision out in 24 hours.

(At this time, end of proceedings for the day.)

CERTIFICATE

I, LESLIE CALLAIS, C.C.R., an Official Court Reporter, do hereby certify that the foregoing is a correct copy of the proceedings taken by me in shorthand and transcribed under my personal supervision.

/s/ Leslie Callais
LESLIE CALLAIS, C.C.R.

FOURTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

NO. 2008-C-0821

SUSAN AND WILLIAM LAURENDINE,
AL LEBOUEF, ALINE HODGES,
PIERRE ASCANI, THERESA HARVEY,
THE HONORABLE DALE N. ATKINS
AND ANITA SARRAT

Plaintiffs/Respondents

VERSUS

THE BOARD OF COMMISSIONERS
FOR THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS

Defendants/Applicants

SUPERVISORY WRIT APPLICATION
FROM THE CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS,
STATE OF LOUISIANA, NO. 05-11660
THE HONORABLE KERN A. REESE,
DIVISION "L" REFERRAL JUDGE,
THE HONORABLE MICHAEL G. BAGNERIS,
DIVISION "H"

ORIGINAL WRIT APPLICATION,
ON BEHALF OF DEFENDANT/APPLICANT
THE BOARD OF COMMISSIONERS FOR THE
ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS

(Filed Jun. 24, 2008)

Respectfully submitted,

Thomas P. Anzelmo, T.A. (#2533)
Mark E. Hanna (#19336)
Kyle P. Kirsch (#26363)
Andre J. Lagarde (#28649)
McCRANIE, SISTRUNK, ANZELMO, HARDY, MAXWELL & McDANIEL
3445 N. Causeway Blvd., Suite 800
Metairie, Louisiana 70002
Telephone: (504) 831-0946
Facsimile: (504) 831-2492
ATTORNEYS FOR THE BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT

James L. Pate (#10333)
Ben L. Mayeaux (#19042)
LABORDE & NEUNER
One Petroleum Center, Ste. 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
Telephone: (337) 237-7000
Facsimile: (337) 233-9450

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the matter at bar pursuant to Article V, § 10 of the Louisiana Constitution of 1974, La. Code of Civil Procedure, Article 2201, and Rules 1-3 and 4-1 of the Uniform Rules of the Louisiana State Courts of Appeal.

STATEMENT OF THE CASE

On September 24, 2005, plaintiffs instituted the present litigation, naming the Orleans Levee District ("OLD") as defendant, seeking damages that resulted from Hurricane Katrina. In their original "Claim for Damages," plaintiffs alleged negligence of the OLD as follows:

6.

a. Designing and installing concrete flood walls which were below standard and potentially unstable in a flood;

b. Failing to test the flood walls for their ability to withstand cascades of lake water that may push over levees during a hurricane;

c. Failing to interlock the flood walls and/or place a top railing or similar system to bind the walls together.[1]

Plaintiffs further averred that "the number of business and property owners affected by the negligence

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[1] Claim for Damages, ¶ 6.

of the defendant are too numerous to mention," and thus, sought class certification for "all residents, business owners, and occupants of the affected areas."[2]

By a First Supplemental and Amending Petition, plaintiffs re-designated the named plaintiffs and added additional theories of negligence against the defendant, OLD, to wit:

> d. Failing to inspect and maintain the levees after their completion;
>
> e. Failing to insure that the proper soil was used in the construction of the levee.[3]

The putative class was also expanded to include "all residents domiciliary and property owners of the Parishes of Orleans and Jefferson" "who were affected by the flooding caused by the failure of the hurricane protection levees and flood wall in New Orleans."[4] By a Second Supplemental and Amending Petition, plaintiffs named additional defendants, and re-averred all allegations of negligence against OLD. The putative class was then redefined as:

> All residents, domiciliaries, property owners and business owners of the parishes of Orleans and Jefferson in the State of Louisiana whose persons, properties or businesses

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[2] Claim for Damages, ¶ 8.

[3] First Supplemental and Amending Petition, ¶ 6.

[4] First Supplemental and Amending Petition, ¶8a.

> were damaged by flooding caused by the failure of the 17th Street Canal and London Avenue Canal hurricane protection levees and floodwalls in New Orleans, Louisiana on or after August 29, 2005, who may suffer such injury or damage in the future as a result thereof or who have sustained a justifiable fear of sustaining such injury or damage in the future as a result thereof.[5]

OLD filed a Motion to Recuse all judges of the Civil District Court for the Parish of Orleans on August 30, 2006. On October 26, 2006, the Honorable Kern Reese, to whom this matter was originally allotted, executed an Order to Re-Allot, in which Judge Reese declined to recuse himself, and requested that defendant's Motion to Recuse be re-allotted to another division for hearing thereon. Thereafter, this matter was re-alloted twice more after the OLD filed individual Motions to Recuse Judge Piper Griffin and Judge Robin Giarrusso. Upon Judge Giarrusso's order that the Clerk of Court, Dale Atkins, re-allot this matter for recusal only, the original Motion was re-allotted to Judge Michael Bagneris.

On February 15, 2007, OLD filed an individual Motion to Recuse Judge Michael Bagneris from hearing the Motion to Recuse Judge Reese. All briefs filed by OLD in support of either motion are adopted herein as if copied in their entirety. On April 30, 2007,

---

[5] Second Supplemental and Amending Petition, ¶ 8a.

Judge Bagneris denied the Motion to Recuse Judge Bagneris. The OLD filed an application for supervisory writs with the Fourth Circuit, which was denied on June 25, 2007. OLD filed an application for supervisory writs with the Supreme Court which was denied October 12, 2007.

On August 29, 2007, however, after OLD's writ application had been filed with the Louisiana Supreme Court, Judge Reese's wife, Dorothy Reese, and his sons, Justin and Jared Reese, filed lawsuits against the OLD in the United States District Court for the Eastern District of Louisiana for damages resulting from levee failures related to Hurricane Katrina.[6] In her lawsuit, Dorothy Reese, Judge Reese's wife, seeks compensation for damages to the property at 4600 Owens Blvd., the home she shared with Judge Kern Reese.[7] This complaint supports OLD's contention that Judge Reese should be recused from this matter.

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[6] *Dorothy Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-4999 (Exhibit "1").

[7] See Act of Cash Sale dated September 14, 2005, attached to Motion to Recuse as Exhibit "2", whereby Judge Reese and Dorothy Reese purchased property in Baton Rouge, Louisiana. The buyers are listed as "Kern A. Reese and Dorothy F. Reese, both persons of the full age of majority, married and living together." Dorothy Farmer Reese is the wife of Judge Kern Reese.

The negligence allegations in the Reese lawsuit against the OLD include, but are not limited to: deficiency in design and construction of the 17th Street Canal's levees and floodwalls, (¶90), negligently failing to install floodgates at the 17th Street Canal (¶91), inadequate design and build of levee and floodwall system on 17th Street Canal (¶91), negligent design and construction of I-walls extending 11 feet above ground, disregarding reports of weakened soil conditions (¶92), and failing to maintain and inspect properly the 17th Street Canal levee/floodwall (¶93). The negligence allegations include knowledge or constructive knowledge of the OLD regarding alleged design and construction deficiencies in light of the soil and the height and instability of the I-walls. (¶90). Damages alleged are those resulting from the levee failures that occurred during, or as a result of, Hurricane Katrina.

The allegations of the Reese federal complaint, although expanded and more comprehensive, are essentially identical to those alleged in the present matter, and the damages sought are those resulting from hurricane and flood effects, as in the case at bar. Although Judge Reese is not a named party, this complaint evidences Judge Reese's pre-judgment of the facts of this case, and his belief that the OLD was negligent, and is liable for the levee failures during Hurricane Katrina. This pre-judgment of the facts and predetermination of liability against OLD reflects Judge Bagneris' actual bias in the present matter, since it

relates to damages to his place of residence at the time of the storm.[8] It also reveals his inextricable interest in the outcome of this matter, as a finding of OLD liabile in this matter would undoubtedly influence the outcome of the federal court actions.[9] Accordingly, Judge Bagneris should have recused Judge Reese from presiding over a matter that would have a significant influence over his wife and son's cases, and a direct impact on damages to his former residence.

ISSUE PRESENTED FOR REVIEW

Did the trial court err by failing to recuse Judge Reese from the matter, despite being presented evidence of valid grounds for Judge Reese's recusation pursuant to law?

ASSIGNMENT OF ERROR

The trial court erred in failing to recuse Judge Reese because the allegations that Judge Reese was biased, prejudiced and interested in the cause and its outcome were valid grounds for his recusation, pursuant to the U.S. Constitution, the La. Constitution, and La. Code of Civil Procedure, Article 151.

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[8] See Transcript of May 21, 2008 hearing before Judge Bagneris, p. 23, attached as Exhibit "3".

[9] See *Aetna Life Insurance Co., v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823.

LAW AND ARGUMENT

I. Due Process guarantees the right to a fair and impartial tribunal. Actual bias by the tribunal is prohibited. Additionally, the possibility of unfairness must be prevented to promote the appearance of justice.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 2 of the Louisiana Constitution of 1974, guarantees to all litigants the right to a fair trial and an impartial tribunal. This right was jurisprudentially recognized by the U.S. Supreme Court in 1955, in *In Re Murchison*[10]:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored **to prevent even the probability of unfairness.** To this end **no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.**[11]

Additionally, the Due Process requirement of judicial impartiality was discussed by the Louisiana Supreme Court in *Wilson v. City of New Orleans*[12]:

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[10] 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

[11] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625 (emphasis added).

[12] 479 So.2d 891 (La. 1985).

> The essential guarantee of the Due Process Clause is **fundamentally fair procedure** for the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property. Therefore, **there must be some type of neutral and detached decision maker**, be it judge, hearing officer or agency.[13] "[A]n impartial decision maker is essential" to due process.[14]

The Louisiana Supreme Court continued:

> Due Process requires that **a decision maker not have a direct or indirect financial stake which would give a possible temptation to the average person as decision maker to make him partisan towards maintaining his high level of revenue generated by his adjudicative function.** Even if an individual cannot show special prejudice in his particular case, **the situation in which an official occupies two inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process.** Nor may the initial factfinding process be deemed constitutionally acceptable simply because the government eventually offers a litigant an impartial de novo adjudication; he is entitled

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[13] *Wilson*, 479 So.2d at 901 (emphasis added).

[14] *Wilson*, 479 So.2d at 901 (citing *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970)).

to a "neutral and detached judge in the first instance."[15]

The Louisiana Code of Civil Procedure recognizes the inability of a judge to fairly and impartially preside over certain matters, and provides a mechanism for recusal. La. C.C.P. Art. 151 specifically provides:

> (B) A judge of any court, trial or appellate, may be recused when he:
>
> > (4) Is the spouse of a party, or of an attorney employed in the cause; or is related to a party, or the spouse of the party, within the fourth degree; or is related to an attorney employed in the cause; or is the spouse of the attorney within the second degree.
> >
> > (5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings.[16]

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[15] *Wilson*, 479 So.2d at 901-902 (emphasis added) (citing *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); and *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

[16] La. Code of Civ. Pro. art. 151(A)(B)(4)-(5).

The OLD submits that Judge Reese has a direct financial stake in this matter, which would give a possible temptation to the average person as decision maker, to make him partisan towards maintaining his high level of revenue generated by his adjudicative function. In light of the pending Reese lawsuit against the OLD for hurricane damage to the Reese home, Judge Reese has an actual bias and prejudice of a substantial nature, and an interest in this cause and its outcome. He is in a situation in which he occupies two inconsistent positions, one partisan and the other judicial. Such necessarily involves a lack of due process which mandates his recusal.

A. The allegations of the Reese federal lawsuit demonstrate his actual bias in this case, and warrant recusal pursuant to the Due Process Clause of the Fourteenth Amendment.

In *Gibson v. Berryhill*,[17] the United States Supreme Court considered under what circumstances bias rose to such a level as to prohibit an administrative board from constitutionally presiding over a license revocation hearing. In *Gibson*, the Alabama Optometry Board ("Board") sought to revoke the licenses of several optometrists who practiced as employees of a corporation, Lee Optical, allegedly constituting the "unlawful practice" of optometry, in

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[17] 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973).

violation of Alabama law.[18] Shortly after the administrative charges were brought before the Board, the Board filed a lawsuit against Lee Optical, seeking to enjoin the company from the "unlawful practice of optometry."[19] The state trial court granted the Board's injunction, prohibiting the corporation from employing the optometrists.[20]

The Board then resumed the administrative proceeding against the optometrists, seeking to revoke their licenses. In response, the optometrists filed a lawsuit in federal court, alleging Civil Rights violations, and seeking an injunction preventing the Board from hearing the pending charges.[21] Because the Board was composed only of those optometrists who were independent optometrists, not employed by others, those optometrists employed by Lee Optical alleged that the "Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law."[22]

The United States District Court noted that the Board, which served as judge and prosecutor in the de-licensing proceedings, had previously filed suit in state court against the plaintiffs for charges virtually

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[18] *Gibson*, 411 U.S. at 567, 93 S. Ct. at 1692.

[19] *Id.* at 568, 1693.

[20] *Id.* at 569, 1693.

[21] *Id.* at 569, 570, 1693.

[22] *Id.* at 570, 1693.

identical to those before it in the administrative de-licensing proceeding.[23] **Considering the earlier lawsuit by the Board, the Board might have "preconceived opinions" regarding the charges pending before it.**[24] Second, because Lee Optical had a large business in Alabama, the Board members stood to gain financially by suspending the optometry licenses of the Lee Optical employees.[25]

The District Court found the Board impermissibly biased for two reasons: (1) the Board had filed substantially identical charges against the optometrists in state court, evidencing the Board's prejudgment of the facts, and (2) the aim of the Board was to revoke the licenses of the optometrists who held one-half of the business in the State which would inure to the financial benefit of the Board members' optometry practices.[26] The District Court held that the Board's bias constitutionally disqualified the Board from presiding over the de-licensing proceedings.[27] The United States Supreme Court affirmed the District Court, opining: "It is sufficiently

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[23] *Id.* at 571, 1694.

[24] *Id.* (emphasis added).

[25] *Id.*

[26] *Id.* at 578, 1697-98.

[27] *Id.* at 578, 1698.

clear from cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."[28]

The rationale espoused in *Gibson v. Berryhill* is decisive here. The Reese lawsuit against OLD seeks compensation for flood damages to the home of Judge and Mrs. Reese. The Reese lawsuit alleges OLD was negligent, and that OLD's negligence caused or led to the levee failures which resulted in the flooding of their home. **As a result, the assertion that Judge Reese has pre-judged the facts of this case cannot be disputed. Although Judge Reese is not listed as a party in the lawsuit, he testified to being a resident of the home at the time of the loss, and to suffering damages.[29] Thus, the lawsuit is clear evidence of his belief that the OLD was negligent, and should he held liable for damages resulting from the flood.**

Thus, the allegations of the Reese lawsuit demonstrate Judge Reese's actual bias and interest in the outcome of this matter. This is in direct contradiction

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[28] *Id.* at 579, 1698 (citing *Tumey v. Ohio*, 47 S. Ct. 437, 441 (1927). Although *Tumey v. Ohio* involved the disqualification of a mayor to preside over a criminal action, which, upon conviction, provided funds to the city, the protections guaranteed by the Due Process Clause extend to both criminal and civil matters. See *Aetna Life Insurance Co., v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823.

[29] See Transcript of May 21, 2008 hearing before Judge Bagneris, pp. 23 & 39, attached as Exhibit "3".

to Due Process and our system of law that "has always endeavored to prevent even the probability of unfairness."[30] Moreover, jurisprudence provides that recusation of a judge because of claims that he is biased or interested in the case to such an extent that he would be unable to conduct fair and impartial proceedings is **required in cases of actual bias or prejudice**.[31] Consequently, Judge Bag[ne]ris erred in his failure to recuse Judge Reese from this matter.

B. Judge Reese's interest in the cause and outcome of this matter warrants recusal pursuant to the Due Process Clause of the Fourteenth Amendment.

In determining whether recusal is warranted under the Due Process Clause, the United States Supreme Court has noted that a judge's interest in a case "cannot be defined with precision. Circumstances and relationships must be considered."[32] The circumstances presented by the present case however, are extreme, as they present more than mere *allegations* of bias and prejudice. "[I]t certainly violates the Fourteenth Amendment. . . . to subject [a person's] liberty or property to the judgment of a court, the judge of which, has a direct, personal, substantial,

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[30] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625.

[31] *Guidry v. First Nat. Bank of Commerce*, 1998-2383 (La.App. 4 Cir. 3/1/00), 755 So. 2d 1033. (emphasis added).

[32] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625.

pecuniary interest in reaching a conclusion against him in his case."[33]

La. C.C.P. Art. 151 B(5) is designed to prevent a judge from presiding over a cause when his spouse or family could be affected by the outcome. Additionally, facts which would indicate that the judge would receive "some personal advantage" from deciding the case for or against one of the parties demonstrate a judge's interest in the cause. Louisiana jurisprudence has defined "interest in the cause" as follows:

> For a judge to have an interest in the caused within the meaning of [La. C.C.P. Art. 151 B(5)], some fact must exist that leads to the conclusion that **it is to the judge's personal advantage** . . . to decide the case or to seek to bring about a decision therein, for or against one of the parties to it.[34]

Judge Reese's interest in the present matter is demonstrated as follows: as discussed above, Judge Reese's wife has a lawsuit pending in federal court against the OLD for flood damages to their home. A judgment or ruling adverse to the interests of the OLD in this litigation would influence the outcome of the federal litigation by creating collateral estoppel

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[33] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22, 106 S. Ct. 1580, 1585, 89 L. Ed. 823 (1986) (citing *Tumey v. Ohio*, 273 U.S.510, 523, 47 S. Ct. 437, 441, 71 L.Ed. 749 (1927)).

[34] *Rollo v. Dison*, 402 So.2d 122 (La. App. 2d Cir. 1981), *writ denied*, 404 So. 2d 265 (La. 1981), quoting *State v. Pailet*, 246 La. 483, 165 So.2d 294 (1964). (emphasis added).

issues. A finding of liability against the OLD would also influence the value of the Reese federal lawsuit. The federal complaint alleges violations of Louisiana state law which,[35] pursuant to the Erie doctrine, must be decided in accordance with Louisiana state law. Thus, the determination of the state law issues in the present case would create precedence for determination of the state law issues in the federal lawsuits.

As a result, allowing Judge Reese to preside over this matter violates the Due Process Clause of the Fourteenth Amendment because he has a direct, personal, substantial, pecuniary interest in the outcome of this case. It is undoubtedly to Judge Reese's personal advantage to rule favorably on issues adverse to OLD in this matter since, as previously noted, the outcome of this case will influence the Reese federal lawsuit. The advantage to be obtained by the judge should not be gained from the proceeding over which he presides. "An interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal **even if that goal is not actually attained in that proceeding.**"[36] This evidence adequately demonstrates that Judge

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[35] *Dorothy Reese v United States of America Board of Commissioners of the Orleans Levee District, et al.*; Exhibit "2", ¶¶11, 13.

[36] *Aetna Life Ins. Co.*, 475 U.S. 813, 830, 106 S. Ct. 1580, 1589-90, 89 L. Ed. 2d 823 (Brennan, J. concurring) (emphasis added).

Reese has a sufficiently direct interest in the outcome of this case. By declining to recuse Judge Reese, Judge Bagneris' ruling will allow Judge Reese to advance his personal interests, since his ruling is certain to influence the outcome of the federal lawsuits. Accordingly, Judge Bagneris erred in failing to recuse Judge Reese, which warrants this Court to grant this writ application, and recuse Judge Reese from presiding over this matter.

C. Judge Reese and his wife are potential class members of the current lawsuit. Thus, Judge Reese has a pecuniary interest in certifying the class and rendering judgment against OLD.

As property owners in Orleans Parish who suffered property damage as a result of levee breaches, Judge Reese and his wife are clearly putative class members as defined in the present litigation. Thus, there exists a pecuniary interest in the proposed class action which mandates recusal.

La. Code Civ. Proc. art. 151 B(4) authorizes recusal when the judge, his spouse, or a family member is a party to the litigation. As evidenced by the federal court pleadings, Judge Reese's home was flooded, thereby according he and his wife status as putative class members. This warrants recusal pursuant to La. Code Civ. Proc. art. 151 B(4). It is noteworthy that this codal provision does *not* require a showing of bias or prejudice; indeed the status of the

judge, his spouse, or relative as a putative class member is sufficient for recusal.

In discussing Article 151 B(4), the Supreme Court, in *In Re Cooks*, held that a judge's recusal is essentially mandated in the event that his spouse is a party, stating:

> Although the Article 151 B(4) says the judge 'may' be recused [where the judge is the spouse of a party], we can foresee no instances where a judge would not be required to recuse himself where he is the spouse of a party . . . in the cause.[37]

The express language of the code article together with the interpreting jurisprudence as set forth in *In Re Cooks*, undoubtedly leads to the conclusion that **bias, prejudice and interest on the part of the judge are presumed where a spouse or other family member within the fourth degree is a party to the case.** As a result, La. Code Civ. Proc. art. 151 B(4) militates in favor of the recusal of Judge Reese from this proceeding.

At least two judges of the Civil District Court have recognized the inability of the CDC bench to preside over this hurricane litigation. In related flood litigation, *Brubbacher v. Board of Commissioners for the Orleans Levee District, et al.*, Civil District Court Docket No. 2006-9775, Judge Robin Giarrusso

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[37] *In Re Cooks*, 96-1147 (La. 5/20/97), 694 So. 2d 892, 903.

recused herself stating, "Since I am a potential plaintiff in this ease, it would be inappropriate for me to be the judge in this matter."[38] An equally relevant example is an Order of Recusal issued by Judge Lloyd J. Medley, Jr. of the Civil District Court, Division D in which Judge Medley recused himself in a related case, reasoning: "The Judge is a putative class member in litigation involving one of these defendants."[39] Thus, Judge Medley recused himself because of class status in another action against the defendants. That Judge Reese and his wife are putative class members in the subject litigation presents a more compelling case for Judge Reese's recusal.

CONCLUSION

The Due Process Clause of the Fourteenth Amendment and the Louisiana Constitution of 1974 guarantees to every litigant the right to a fair trial and impartial tribunal. The filing of the Reese lawsuit in federal court against the OLD, with allegations essentially identical to those made by the plaintiff's against OLD in this matter, demonstrates Judge Reese's actual bias in this case, as well as his interest in this cause and its outcome, both valid grounds **requiring** his recusation. As such, Judge

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[38] January 18, 2007 Order, attached to defendant's Fourth Circuit Writ Application as Exhibit "16."

[39] March 5, 2007 Order of Recusal was attached as Exhibit "1" to defendant's Fourth Circuit Reply Brief in Support of Writ Application.

Bagneris' failure to recuse Judge Reese violated the Due Process Clause of the Fourteenth Amendment and the Louisiana Constitution.

For these reasons, applicant, The Board of Commissioners of the Orleans Levee District, respectfully requests that this Honorable Court exercise its supervisory jurisdiction by granting this writ application, and REVERSE the trial court's May 23, 2008 Judgment denying applicant's Motion to Recuse Judge Kern A. Reese.

Respectfully submitted,

/s/ Thomas P. Anzelmo
Thomas P. Anzelmo, T.A. (#2533)
Mark E. Hanna (#19336)
Kyle P. Kirsch (#26363)
Andre J. Lagarde (#28649)
McCRANIE, SISTRUNK,
ANZELMO, HARDY, MAXWELL
& McDANIEL
3445 N. Causeway Boulevard,
Ste. 800
Metairie, LA 70002
TELEPHONE: (504) 831-0946
FACSIMILE: (504) 831-2492
and
Ben L. Mayeaux #19042
James L. Pate #10333
One Petroleum Center, Suite 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
TELEPHONE:(337) 237-7000
FACSIMILE:(337) 233-9450

Attorneys for The Orleans Levee District

AFFIDAVIT VERIFYING ALLEGATIONS AND SERVICE

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, a Notary Public in and for the said Parish, State of Louisiana, personally came and appeared:

THOMAS P. ANZELMO

who, being by me first duly sworn did depose and say:

That he is attorney for in this case; that he has read the above and foregoing Application for Supervisory Writs; that all of the allegations contained therein are true and correct to the best of his knowledge and that copies of this Application for Supervisory Writs were duly served on the following:

Hon. Michael Bagneris
Civil District Court
Parish of Orleans
421 Loyola Avenue, Rm. 304
New Orleans, La. 70112
(504) 592-9336

Hon. Kern A. Reese
Judge, Division "L"
Civil District Court
for the Parish of Orleans
421 Loyola Avenue
New Orleans, Louisiana
70112

Darleen M. Jacobs, Esq.
Al A. Sarrat, Esq.
Jacobs & Sarrat
823 St. Louis Street
New Orleans, La. 70112
(504) 522-3287
Attorneys for Plaintiffs

Timothy W. Hassinger, Esq.
Galloway, Johnson,
Thompkins, Burr & Smith
701 Poydras Street,
Suite 4040
New Orleans, La. 70139
(504) 525-6802
Attorneys for the
State of Louisiana/
Dept. of Transportation
& Development

Charles M. Lanier, Esq.
Christovich & Kearney
601 Poydras Street,
Suite 2300
New Orleans, La. 70130
(504) 561-5700
Attorneys for Sewerage
and Water Board of
New Orleans

by electronic transmission and by depositing a copy of same in the United States mail, postage prepaid and properly addressed.

/s/ Thomas P. Anzelmo
Thomas P. Anzelmo

SWORN TO AND SUBSCRIBED BEFORE ME, Notary, this 23rd day of June, 2008.

/s/ Mark E. Hanna
NOTARY PUBLIC
Mark E. Hanna
Bar Roll # 19336
Identification Number

FOURTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

NO. 2008-C-0822

SUSAN AND WILLIAM LAURENDINE,
AL LEBOUEF, ALINE HODGES, PIERRE ASCANI,
THERESA HARVEY, THE HONORABLE
DALE ATKINS AND ANITA SARRAT

Plaintiffs/Respondents

VERSUS

THE BOARD OF COMMISSIONERS
FOR THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS

Defendants/Applicants

SUPERVISORY WRIT APPLICATION FROM
THE CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS, STATE OF LOUISIANA,
NO. 05-11660 THE HONORABLE
MICHAEL G. BAGNERIS, DIVISION "H"

ORIGINAL WRIT OF APPLICATION,
ON BEHALF OF DEFENDANT/APPLICANT
THE BOARD OF COMMISSIONERS FOR
THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS

(Filed Jun. 24, 2008)

Respectfully submitted,

Thomas P. Anzelmo,
T.A. (#2533)
Mark E. Hanna (#19336)
Kyle P. Kirsch (#26363)
Andre J. Lagarde (#28649)
McCRANIE, SISTRUNK,
ANZELMO, HARDY,
MAXWELL &
McDANIEL
3445 N. Causeway Blvd.,
Suite 800
Metairie, Louisiana 70002
Telephone: (504) 831-0946
Facsimile: (504) 831-2492
ATTORNEYS FOR
THE BOARD OF
COMMISSIONERS OF
THE ORLEANS LEVEE
DISTRICT

James L. Pate (#10333)
Ben L. Mayeaux (#19042)
LABORDE & NEUNER
One Petroleum Center,
Ste. 200
1001 West Pinhook Road
Lafayette, Louisiana
70503
Telephone: (337) 237-7000
Facsimile: (337) 233-9450

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the matter at bar pursuant to Article V, § 10 of the Louisiana Constitution of 1974, La. Code of Civil Procedure, Article 2201, and Rules 1-3 and 4-1 of the Uniform Rules of the Louisiana State Courts of Appeal.

STATEMENT OF THE CASE

On September 24, 2005, plaintiffs instituted the present litigation, naming the Orleans Levee District ("OLD") as defendant, seeking damages that resulted from Hurricane Katrina. In their original "Claim for Damages," plaintiffs alleged negligence of the OLD as follows:

> 6.
>
> a. Designing and installing concrete flood walls which were below standard and potentially unstable in a flood;
>
> b. Failing to test the flood walls for their ability to withstand cascades of lake water that may push over levees during a hurricane;
>
> c. Failing to interlock the flood walls and/or place a top railing or similar system to bind the walls together.[1]

Plaintiffs further averred that "the number of business and property owners affected by the negligence of the defendant are too numerous to mention," and thus, sought class certification for "all residents, business owners, and occupants of the affected areas."[2]

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[1] Claim for Damages, ¶ 6.

[2] Claim for Damages, ¶ 8.

By a First Supplemental and Amending Petition, plaintiffs re-designated the named plaintiffs and added additional theories of negligence against the defendant, OLD, to wit:

> d. Failing to inspect and maintain the levees after their completion;
>
> e. Failing to insure that the proper soil was used in the construction of the levee.[3]

The putative class was also expanded to include "all residents domiciliary and property owners of the Parishes of Orleans and Jefferson" "who were affected by the flooding caused by the failure of the hurricane protection levees and flood wall in New Orleans."[4] By a Second Supplemental and Amending Petition, plaintiffs named additional defendants, and re-averred all allegations of negligence against OLD. The putative class was then redefined as:

> All residents, domiciliaries, property owners and business owners of the parishes of Orleans and Jefferson in the State of Louisiana whose persons, properties or businesses were damaged by flooding caused by the failure of the 17th Street Canal and London Avenue Canal hurricane protection levees and floodwalls in New Orleans, Louisiana on or after August 29, 2005, who may suffer such injury or damage in the future as a

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[3] First Supplemental and Amending Petition, ¶ 6.

[4] First Supplemental and Amending Petition, ¶ 8a.

> result thereof or who have sustained a justifiable fear of sustaining such injury or damage in the future as a result thereof.[5]

OLD filed a Motion to Recuse all judges of the Civil District Court for the Parish of Orleans on August 30, 2006. On October 26, 2006, the Honorable Kern Reese, to whom this matter was originally allotted, executed an Order to Re-Allot, in which Judge Reese declined to recuse himself, and requested that defendant's Motion to Recuse be re-allotted to another division for hearing thereon. Thereafter, this matter was re-alloted twice more after the OLD filed individual Motions to Recuse Judge Piper Griffin and Judge Robin Giarrusso. Upon Judge Giarrusso's order that the Clerk of Court, Dale Atkins, re-allot this matter for recusal only, the original Motion was re-allotted to Judge Michael Bagneris.

On February 15, 2007, OLD filed an individual Motion to Recuse Judge Michael Bagneris from hearing the Motion to Recuse Judge Reese. All briefs filed by OLD in support of either motion are adopted herein as if copied in their entirety. On April 30, 2007, Judge Bagneris denied the Motion to Recuse Judge Bagneris. The OLD filed an application for supervisory writs with the Fourth Circuit, which was denied on June 25, 2007. OLD filed an application for supervisory

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[5] Second Supplemental and Amending Petition, ¶ 8a.

writs with the Supreme Court which was denied October 12, 2007.

However, on September 4, 2007, after denying the OLD's Motion to Recuse, and after OLD's writ application had been filed with the Louisiana Supreme Court, Judge Bagneris, along with his wife, Madlyn, filed a complaint against the OLD in the United States District Court for the Eastern District of Louisiana,[6] seeking compensation for property damage to their home at XXXX XXXXXXXX XXXXX, New Orleans, La. This complaint supports OLD's contention that Judge Bagneris should be recused from this matter.

Judge Bagneris' negligence allegations against the OLD include, but are not limited to: deficiency in design and construction of the 17th Street Canal's levees and floodwalls, (¶ 115), negligently failing to install floodgates at the 17th Street Canal (¶ 116), inadequate design and build of levee and floodwall system on 17th Street Canal (¶ 116), negligent design and construction of I-walls extending 11 feet above ground, disregarding reports of weakened soil conditions (¶ 117), and failing to maintain and inspect properly the 17th Street Canal levee/floodwall (¶ 118). The

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[6] Civil Action No. 07-5378 entitled "Michael G. and Madlyn P. Bagneris vs. United States of America, Board of Commissioners of the Orleans Levee District, et al." (Exhibit "1"), which includes Exhibit "A", Form 95 of the Dept. of Justice, Claim for Damage, Injury or Death. That form lists Madlyn and Michael Bagneris as witnesses.

negligence allegations include knowledge or constructive knowledge of the OLD regarding alleged design and construction deficiencies in light of the soil and the height and instability of the I-walls. (¶ 115). Damages alleged are those resulting from the levee failures that occurred during, or as a result of, Hurricane Katrina.

The allegations of Judge Bagneris' federal complaint, although expanded and more comprehensive, are essentially identical to those alleged in the present matter, and the damages sought are those resulting from hurricane and flood effects, as in the case at bar. This complaint evidences Judge Bagneris' pre-judgment of the facts of this case, and his belief that the OLD was negligent, and is liable for the levee failures during Hurricane Katrina. This pre-judgment of the facts and predetermination of liability against OLD reflects Judge Bagneris' actual bias in the present matter. It also reveals his inextricable interest in the outcome of this matter, since finding OLD liable here would undoubtedly influence the outcome of the federal court actions.[7] Accordingly, Judge Bagneris should be precluded from selecting the tribunal to hear a matter that would have a significant influence over his case, and should be recused from hearing the Motion to Recuse Judge Reese.

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[7] See *Aetna Life Insurance Co., v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823.

ISSUE PRESENTED FOR REVIEW

Did the trial court err in hearing the Motion to Recuse Judge Bagneris from the Motion to Recuse Judge Reese despite being presented valid grounds for his recusation pursuant to law?

ASSIGNMENT OF ERROR

The trial court erred in hearing the Motion to Recuse Judge Bagneris from the Motion to Recuse Judge Reese because the allegations that Judge Bagneris was biased, prejudiced and interested in the cause and its outcome were valid grounds for his recusation, pursuant to the U.S. Constitution, the La. Constitution, and La. Code of Civil Procedure, Article 151.

LAW AND ARGUMENT

I. Due Process guarantees the right to a fair and impartial tribunal. Actual bias by the tribunal is prohibited. Additionally, the possibility of unfairness must be prevented to promote the appearance of justice.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 2 of the Louisiana Constitution of 1974, guarantees to all litigants the right to a fair

trial and an impartial tribunal. This right was jurisprudentially recognized by the U.S. Supreme Court in 1955, in *In Re Murchisons*[8]:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored **to prevent even the probability of unfairness.** To this end **no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.**[9]

Additionally, the Due Process requirement of judicial impartiality was discussed by the Louisiana Supreme Court in *Wilson v. City* of *New Orleans*[10]:

> The essential guarantee of the Due Process Clause is **fundamentally fair procedure** for the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property. Therefore, **there must be some type of neutral and detached decision maker,** be it judge, hearing officer or agency.[11] "[A]n

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[8] 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

[9] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625 (emphasis added).

[10] 479 So.2d 891 (La. 1985).

[11] *Wilson*, 479 So.2d at 901 (emphasis added).

> impartial decision maker is essential" to due process.[12]

The Louisiana Supreme Court continued:

> Due Process requires that **a decision maker not have a direct or indirect financial stake which would give a possible temptation to the average person as decision maker to make him partisan towards maintaining his high level of revenue generated by his adjudicative function**. Even if an individual cannot show special prejudice in his particular case, **the situation in which an official occupies two inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process**. Nor may the initial factfinding process be deemed constitutionally acceptable simply because the government eventually offers a litigant an impartial de novo adjudication; he is entitled to a "neutral and detached judge in the first instance."[13]

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[12] *Wilson*, 479 So.2d at 901 (citing *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970)).

[13] *Wilson*, 479 So.2d at 901-902 (emphasis added) (citing *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); and *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

A. The allegations of Judge Bagneris' federal lawsuit demonstrate his pre-judgment of the facts of this case and warrant recusal pursuant to the Due Process Clause of the Fourteenth Amendment.

In *Gibson v. Berryhill,*[14] the United States Supreme Court considered under what circumstances bias rose to such a level as to prohibit an administrative board from constitutionally presiding over a license revocation hearing. In *Gibson,* the Alabama Optometry Board ("Board") sought to revoke the licenses of several optometrists who practiced as employees of a corporation, Lee Optical, allegedly constituting the "unlawful practice" of optometry, in violation of Alabama law.[15] Shortly after the administrative charges were brought before the Board, the Board filed a lawsuit against Lee Optical, seeking to enjoin the company from the "unlawful practice of optometry."[16] The state trial court granted the Board's injunction, prohibiting the corporation from employing the optometrists.[17]

The Board then resumed the administrative proceeding against the optometrists, seeking to revoke their licenses. In response, the optometrists

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[14] 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973).

[15] *Gibson*, 411 U.S. at 567, 93 S. Ct. at 1692.

[16] *Id.* at 568, 1693.

[17] *Id.* at 569, 1693.

filed a lawsuit in federal court, alleging Civil Rights violations, and seeking an injunction preventing the Board from hearing the pending charges.[18] Because the Board was composed only of those optometrists who were independent optometrists, not employed by others, those optometrists employed by Lee Optical alleged that the "Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law."[19]

The United States District Court noted that the Board, which served as judge and prosecutor in the de-licensing proceedings, had previously filed suit in state court against the plaintiffs for charges virtually identical to those before it in the administrative de-licensing proceeding.[20] **Considering the earlier lawsuit by the Board, the Board might have "preconceived opinions" regarding the charges pending before it.**[21] Second, because Lee Optical had a large business in Alabama, the Board members stood to gain financially by suspending the optometry licenses of the Lee Optical employees.[22]

The District Court found the Board impermissibly biased for two reasons: (1) the Board had filed substantially identical charges against the optometrists

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[18] *Id.* at 569, 570, 1693.

[19] *Id.* at 570, 1693.

[20] *Id.* at 571, 1694.

[21] *Id.* (emphasis added).

[22] *Id.*

in state court, evidencing the Board's pre-judgment of the facts, and (2) the aim of the Board was to revoke the licenses of the optometrists who held one-half of the business in the State which would inure to the financial benefit of the Board members' optometry practices.[23] The District Court held that the Board's bias constitutionally disqualified the Board from presiding over the de-licensing proceedings.[24] The United States Supreme Court affirmed the District Court, opining: "It is sufficiently clear from cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."[25]

The rationale espoused in *Gibson v. Berryhill* is decisive here. In his federal court lawsuit, Judge Bagneris alleges OLD was negligent, and that OLD's negligence caused or led to the levee failures which resulted in the flooding of his home. **As a result, the assertion that Judge Bagneris has pre-judged the facts of this case cannot be disputed. Judge Bagneris' lawsuit is clear evidence of his belief that the OLD was negligent, and should be held liable for damages resulting from the flood.**

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[23] *Id.* at 578, 1697-98.

[24] *Id.* at 578, 1698.

[25] *Id.* at 579, 1698 (citing *Tumey v. Ohio*, 47 S. Ct. 437, 441 (1927). Although *Tumey v. Ohio* involved the disqualification of a mayor to preside over a criminal action, which, upon conviction, provided funds to the city, the protections guaranteed by the Due Process Clause extend to both criminal and civil matters. See *Aetna Life Insurance Co., v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823.

Thus, the allegations of Judge Bagneris' lawsuit demonstrate his actual bias and interest in the outcome of the matter in which the Motion to Recuse Judge Reese is pending. In effect, by refusing to recuse himself or re-allot the Motion to Recuse Judge Reese, Judge Bagneris is judging a matter in which he has an actual bias by single-handedly selecting the tribunal over a matter that will significantly impact his own case. This is in direct contradiction to Due Process and our system of law that "has always endeavored to prevent even the probability of unfairness."[26] Consequently, Judge Bag[ne]ris erred in his refusal to recuse himself or re-allot this matter.

B. Judge Bagneris' pecuniary interest in the outcome of this matter warrants recusal pursuant to the Due Process Clause of the Fourteenth Amendment.

In determining whether recusal is warranted, the United States Supreme Court has noted that a judge's interest in a case "cannot he defined with precision. Circumstances and relationships must be considered."[27] The circumstances presented by the present case, however, are extreme, as they present more than mere *allegations* of bias and prejudice. "[I]t certainly violates the Fourteenth Amendment . . . . to

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[26] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625.

[27] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625.

subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."[28]

Judge Bagneris' interest in the present matter is demonstrated as follows: as discussed above, Judge Bagneris and his wife have a lawsuit pending in federal court against the OLD for flood damages to their home. A judgment or ruling adverse to the interests of the OLD in this litigation would influence the outcome of the federal litigation by creating collateral estoppel issues. A finding of liability against the OLD would also influence the value of Judge Bagneris' federal lawsuit. The federal complaint alleges violations of Louisiana state law which,[29] pursuant to the Erie doctrine, must be decided in accordance with Louisiana state law. Thus, the determination of the state law issues in the present case would create precedence for determination of the state law issues in the federal lawsuits.

As a result, allowing Judge Bagneris to preside over his own recusal motion violates the Due Process Clause of the Fourteenth Amendment because he has a direct, personal, substantial, pecuniary interest in

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[28] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22, 106 S. Ct. 1580, 1585, 89 L. Ed. 823 (1986) (citing *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L.Ed. 749 (1927)).

[29] *Michael G. and Madelyn P. Bagneris v. United States of America Board of Commissioners of the Orleans Levee District, et al.*; Exhibit "1", ¶¶ 15, 17.

the outcome of this case. The advantage to be obtained by the judge should not be gained from the proceeding over which he presides. "An interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal **even if that goal is not actually attained in that proceeding**."[30] Judge Bagneris undoubtedly has a sufficiently direct interest in the outcome of this case. By failing to recuse himself, and further declining to recuse Judge Reese, with knowledge of the fact that Judge Reese's wife and sons have pending lawsuits against the OLD, Judge Bagneris' interests in his own lawsuit are advanced since Judge Reese's continued presiding over the present matter is certain to influence the outcome of the federal lawsuits. Accordingly, Judge Bagneris erred in not recusing himself or re-alloting this matter, which warrants this Court to grant this writ application, recuse Judge Bagneris from hearing the Motion to Recuse Judge Reese, and re-allot the Motion to be heard by a judge ad-hoc.

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[30] *Aetna Life Ins. Co.*, 475 U.S. 813, 830, 106 S. Ct. 1580, 1589-90, 89 L. Ed. 2d 823 (Brennan, J. concurring) (emphasis added).

II. JUDGE BAGNERIS WAS REQUIRED BY LAW TO RECUSE HIMSELF OR RE-ALLOT THE MATTER ONCE VALID GROUNDS FOR HIS RECUSATION WERE PRESENTED.

The Louisiana Code of Civil Procedure recognizes the inability of a judge to fairly and impartially preside over certain matters, and provides a mechanism for recusal. La. C.C.P. Art. 151 specifically provides:

> (B) A judge of any court, trial or appellate, may be recused when he:
>
> > (4) Is the spouse of a party, or of an attorney employed in the cause; or is related to a party, or the spouse of the party, within the fourth degree; or is related to an attorney employed in the cause; or is the spouse of the attorney within the second degree.
> >
> > (5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings.[31]

Although the cited provisions provide permissive bases for recusal, jurisprudence provides that recusation of a judge because of claims that he is biased or interested in the case to such an extent that he would

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[31] La. Code of Civ. Pro. art. 151 B. (4)-(5).

be unable to conduct fair and impartial proceedings is **required in cases of actual bias or prejudice**.[32]

Furthermore, La. C.C.P. art. 154 provides the proper procedure for recusal of judges. The article provides, in pertinent part: "If a valid ground for recusation is set forth in the motion, the judge **shall** either recuse himself, or refer the motion to another judge or a judge ad hoc, as provided in Articles 155 and 156, for a hearing."[33]

Additionally, the Code of Judicial Conduct recognizes that a judge should be recused in any matter in which his **impartiality might even be questioned:**

> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule.[34]

Interestingly, Judge Bagneris recognized *this* obligation on the record of the hearing of the Motions to

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[32] *Guidry v. First Nat. Bank of Commerce*, 1998-2383 (La. App. 4 Cir. 3/1/00), 755 So. 2d 1033. (emphasis added).

[33] La. Code Civ. Proc. art. 154 (emphasis added).

[34] Canon 3(C) of the Code of Judicial Conduct. The Honorable Judge Robin Giarrusso recused herself from related flood litigation in *Brubbacher v. Board of Commissioners for the Orleans Levee District, et al*, Case no. 2006-9775. Additionally, Judges Cade, Medley and Ledet have also recused themselves in matters involving flooding litigation resulting from Hurricane Katrina.

Recuse, as well as in his written Reasons for Judgment in those matters, by noting that "if he were presiding over the merits of this case he would recuse himself pursuant to Canon 3(C)-the appearance of impropriety."[35]

However, Judge Bagneris failed to recuse himself from the hearing, or re-allot the matter pursuant to law, after being presented with valid grounds for his own recusation; those grounds being (1) his bias in favor of plaintiffs and prejudice against the OLD; and (2) his interest in this cause and its outcome. Both of these grounds are clearly demonstrated by his filing of the federal lawsuit against OLD with allegations essentially identical to the present case. In circumstances where the grounds for recusation are not frivolous or invalid on the face of the pleading, the judge is **prohibited from both refusing to recuse himself and dismissing the motion**.[36]

In this instance, the grounds set out in defendant's Motion to Recuse Judge Bagneris were neither frivolous nor invalid. Moreover, they demonstrated Judge Bagneris' actual bias and interest in the case to such an extent that he would be unable to conduct fair and impartial proceedings such that his recusal is required by law. Judge Bagneris' failure to recuse him or refer the motion was error, and warrants this Court

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[35] Reasons for Judgment, attached hereto as Exhibit "2".

[36] *Roy v. Roy*, 285 So. 2d 867, 869 (La. App. 4th Cir. 1973). (emphasis added).

to grant this writ application, recuse Judge Bagneris from hearing the Motion to Recuse Judge Reese, and re-allot the Motion to be heard by a judge ad-hoc.

CONCLUSION

The Due Process Clause of the Fourteenth Amendment and the Louisiana Constitution of 1974, guarantee to every litigant the right to a fair trial and impartial tribunal. Judge Bagneris' filing of a lawsuit in federal court against the OLD, with allegations essentially identical to those made by the plaintiff's [sic] against OLD in this matter, demonstrates his actual bias in this case, as well as his interest in this cause and its outcome. As such, Judge Bagneris' hearing of the Motion to Recuse him violated the Due Process Clause of the Fourteenth Amendment.

Additionally, Judge Bagneris was required by law to recuse himself or refer the motion to another judge after being presented with valid grounds for his recusal. The grounds presented for his recusal were neither frivolous, nor invalid on their face. Moreover, the grounds demonstrated an actual bias of Judge Bagneris, which require his recusal.

For these reasons, applicant, The Board of Commissioners of the Orleans Levee District, respectfully requests that this Honorable Court exercise its supervisory jurisdiction by granting this writ application, and REVERSE the trial court's May 23, 2008 Judgment denying applicant's Motion to Recuse

Judge Michael G. Bagneris from hearing the Motion to Recuse Judge Kern A. Reese.

Respectfully submitted,

/s/ Thomas P. Anzelmo

Thomas P. Anzelmo,
T.A. (#2533)
Mark E. Hanna (#19336)
Kyle P. Kirsch (#26363)
Andre J. Lagarde (#28649)
McCRANIE, SISTRUNK,
ANZELMO, HARDY,
MAXWELL & McDANIEL
3445 N. Causeway Boulevard,
Ste. 800
Metairie, LA 70002
TELEPHONE: (504) 831-0946
FACSIMILE: (504) 831-2492

and

Ben L. Mayeaux #19042
James L. Pate #10333
One Petroleum Center,
Suite 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
TELEPHONE: (337) 237-7000
FACSIMILE: (337) 233-9450
Attorneys for The Orleans
Levee District

AFFIDAVIT VERIFYING ALLEGATIONS AND SERVICE

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, a Notary Public in and for the said Parish, State of Louisiana, personally came and appeared:

THOMAS P. ANZELMO

who, being by me first duly sworn depose and say:

That he is attorney for in this case; that he has read the above and foregoing Application for Supervisory Writs; that all of the allegations contained therein are true and correct to the best of his knowledge and that copies of this Application for Supervisory Writs were duly served on the following:

Hon. Michael Bagneris
Civil District Court
Parish of Orleans
421 Loyola Avenue,
Rm. 304
New Orleans, La. 70112
(504) 592-9336

Hon. Kern A. Reese
Judge, Division "L"
Civil District Court for
the Parish of Orleans
421 Loyola Avenue
New Orleans, Louisiana
70112

Darleen M. Jacobs, Esq.
Al A. Sarrat, Esq.
Jacobs & Sarrat
823 St. Louis Street
New Orleans, La. 70112
(504) 522-3287
Attorneys for Plaintiffs

Timothy W. Hassinger, Esq.
Galloway, Johnson, Thompkins, Burr & Smith
701 Poydras Street, Suite 4040
New Orleans, La. 70139
(504) 525-6802
Attorneys for the State of Louisiana/Dept. of Transportation & Development

Charles M. Lanier, Esq.
Christovich & Kearney
601 Poydras Street, Suite 2300Z
New Orleans, La. 70130
(504) 561-5700
Attorneys for Sewerage and Water Board of New Orleans

by electronic transmission and by depositing a copy of same in the United States mail, postage prepaid and properly addressed.

/s/ Thomas P. Anzelmo
Thomas P. Anzelmo

SWORN TO AND SUBSCRIBED BEFORE ME, Notary, this 23rd day of June, 2008.

/s/ Mark E. Hanna
NOTARY PUBLIC

Mark E. Hanna
Bar Roll # 19336
Identification Number

STATE OF LOUISIANA

SUPREME COURT

NO. _____

SUSAN AND WILLIAM LAURENDINE, ET AL
Plaintiffs/Respondents

VERSUS

THE BOARD OF COMMISSIONERS FOR
THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS, ET AL
Defendants/Applicants

APPLICATION FOR SUPERVISORY WRITS
TO REVIEW THE DENIAL OF DEFENDANT'S
MOTION TO RECUSE
JUDGE KERN A. REESE
CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS, STATE OF LOUISIANA,
NO. 05-11660, DIVISION "L"
HONORABLE MICHAEL G. BAGNERIS, PRESIDING
FOURTH CIRCUIT COURT OF APPEAL,
NO. 2008-C-0821
WRIT DENIED JULY 28, 2008
JUDGES LANDRIEU, ARMSTRONG, TOBIAS

ORIGINAL APPLICATION ON BEHALF OF THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS

CIVIL PROCEEDING

Respectfully submitted,

/s/ Kyle P. Kirsch
Thomas P. Anzelmo, T.A. (#2533)
Mark E. Hanna (#19336)
Kyle P. Kirsch (#26363)
Andre J. Lagarde (#28649)
McCRANIE, SISTRUNK, ANZELMO, HARDY, MAXWELL & McDANIEL
3445 N. Causeway Blvd., Suite 800
Metairie, Louisiana 70002
Telephone: (504) 831-0946
Facsimile: (504) 831-2492

James L. Pate (#10333)
Ben L. Mayeaux (#19042)
LABORDE & NEUNER
One Petroleum Center, Ste. 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
Telephone: (337) 237-7000
Facsimile: (337) 233-9450

ATTORNEYS FOR THE BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT

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STATEMENT OF WRIT GRANT CONSIDERATIONS SATISFIED PURSUANT TO RULE X, SECTION 1(a)

The Louisiana Code of Civil Procedure provides a mechanism for recusal in instances when a judge is unable to fairly and impartially preside over certain matters. Article 151, as amended by Acts 1983, No. 106, § 1; Acts 1987, No. 579, § 1; Acts 1988, No. 515, § 2, eff. Jan. 1, 1989, permits recusal when a judge is biased, prejudiced, or interested in the cause or its outcome, or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings. Despite being presented substantial

evidence of Judge Kern Reese's bias, prejudice and interest in the cause and outcome of this case, Judge Michael Bagneris denied a Motion to Recuse filed by the Orleans Levee District ("OLD"). Judge Bagneris' failure to recuse Judge Reese violated the Due Process Clause of the United States and Louisiana Constitutions, as well as the Code of Civil Procedure, and such decision warrants this Court's exercise of supervisory jurisdiction as provided by La. Sup. Ct. Rule X 1(a)(4).

Plaintiffs filed a Petition for Damages against the OLD for damages sustained as a result of the levee breaches that occurred during Hurricane Katrina, Plaintiffs have sought class certification of this matter. Subsequently, Judge Reese's wife, Dorothy Reese, and his sons, Justin and Jared Reese, each filed complaints against the OLD in the United States District Court for the Eastern District of Louisiana. Each Reese suit alleges OLD was negligent in various and numerous respects for the levee failures, and seeks compensation for damages. The allegations of OLD's negligence in each suit are almost identical to those made by the plaintiffs in this case. Consequently, OLD filed a Motion to Recuse Judge Kern Reese from this case, on the grounds that Judge Reese is biased in favor of the plaintiffs and prejudiced against the OLD, and has a pecuniary interest in the outcome of this matter.

RULE X 1(a)(4): ERRONEOUS INTERPRETATION OR APPLICATION OF CONSTITUTION OR LAWS.

When considering Motions to Recuse, courts have consistently held that the bias, prejudice or personal interest must be of a substantial nature and based on more than conclusory allegations.[1] Moreover, such claims **require** recusal upon a showing of a judge's actual bias or prejudice.[2] In support of its Motion to Recuse Judge Reese, OLD presented evidence to the trial court which demonstrated his actual bias and prejudice against the OLD, as well as his interest in the outcome of this matter. Nevertheless, Judge Bagneris denied the motion, determining that "the facts presented were . . . wholly insufficient to rise to the level which would warrant recusal."[3]

Additionally, the trial court and the Fourth Circuit erroneously interpreted the law as set forth in the United States and Louisiana Constitutions, and the Louisiana Code of Civil Procedure. In denying defendant's application for Supervisory Writs, the Fourth Circuit sanctioned the trial court's holding. In so doing, both courts ignored the due process provisions which guarantee Defendant's right to a fair and

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[1] *Pierce v. Charity Hospital*, 550 So.2d 211, 214-15 (La. App. 4th Cir. 1989), *writ denied*, 551 So.2d 1341 (La.1989), and cases cited therein.

[2] *Guidry v. First Nat. Bank of Commerce*, 1998-2383 (La.App. 4 Cir. 3/1/00), 755 So. 2d 1033. (emphasis added).

[3] *See Appendix*, Exhibit B, Reasons for Judgment.

impartial tribunal, and the provisions of La. C.C.P. Art. 151, which permit a judge's recusal when it has been demonstrated the judge is biased, or has an interest in the outcome of the matter. Accordingly, these erroneous interpretations warrant the exercise of this Court's supervisory jurisdiction pursuant to La. Sup. Ct. Rule X 1(a)(4).

SUGGESTED DISPOSITION: **Grant with order.** After being presented evidence showing Judge Reese's actual bias, prejudice, and interest in the outcome of this case, Judge Bagneris was required to recuse Judge Reese from hearing this case on the merits. Judge Bagneris' failure to do so violates the United States and Louisiana Constitutions, and the Louisiana Code of Civil Procedure. Therefore, this Court should exercise its supervisory jurisdiction, grant this writ application, and reverse the trial court's ruling denying applicant's Motion to Recuse Judge Reese.

STATEMENT OF THE CASE

On September 24, 2005, plaintiffs instituted the present litigation, naming the Orleans Levee District ("OLD") as defendant, seeking damages that resulted from Hurricane Katrina. In their original "Claim for Damages," plaintiffs alleged negligence of the OLD as follows:

6.

a. Designing and installing concrete flood walls which were below standard and potentially unstable in a flood;

b. Failing to test the flood walls for their ability to withstand cascades of lake water that may push over levees during a hurricane;

c. Failing to interlock the flood walls and/or place a top railing or similar system to bind the walls together.

Plaintiffs further averred that "the number of business and property owners affected by the negligence of the defendant are too numerous to mention," and thus, sought class certification for "all residents, business owners, and occupants of the affected areas."

By a First Supplemental and Amending Petition, plaintiffs re-designated the named plaintiffs and added additional theories of negligence against the defendant, OLD, to wit:

d. Failing to inspect and maintain the levees after their completion;

e. Failing to insure that the proper soil was used in the construction of the levee.

The putative class was also expanded to include "all residents (sic) domiciliary (sic) and property owners of the Parishes of Orleans and Jefferson" "who were affected by the flooding caused by the failure of the hurricane protection levees and flood wall (sic) in New Orleans."

By a Second Supplemental and Amending Petition, plaintiffs named additional defendants, and reaverred all allegations of negligence against OLD. The putative class was then redefined as:

> All residents, domiciliaries, property owners and business owners of the parishes of Orleans and Jefferson in the State of Louisiana whose persons, properties or businesses were damaged by flooding caused by the failure of the 17th Street Canal and London Avenue Canal hurricane protection levees and floodwalls in New Orleans, Louisiana on or after August 29, 2005, who may suffer such injury or damage in the future as a result thereof or who have sustained a justifiable fear of sustaining such injury or damage in the future as a result thereof.

OLD filed a Motion to Recuse all judges of the Civil District Court for the Parish of Orleans on August 30, 2006. On October 26, 2006, the Honorable Kern Reese, to whom this matter was originally allotted, executed an Order to Re-Allot, in which Judge Reese declined to recuse himself, and requested that defendant's Motion to Recuse be reallotted to another division for hearing thereon. Thereafter, this matter was re-alloted twice more after the OLD filed individual Motions to Recuse Judge Piper Griffin and Judge Robin Giarrusso. Upon Judge Giarrusso's order that the Clerk of Court, the Honorable Dale Atkins, re-allot this matter for recusal only, the original Motion was re-allotted to Judge Michael Bagneris.

On February 15, 2007, OLD filed an individual Motion to Recuse Judge Michael Bagneris from hearing the Motion to Recuse Judge Reese, On April 30, 2007, Judge Bagneris denied the Motion to Recuse Judge Bagneris. The OLD filed an application for supervisory writs with the Fourth Circuit, which was denied on June 25, 2007. OLD filed an application for supervisory writs with this Court which was denied October 12, 2007.

On August 29, 2007, however, ***after*** OLD's writ application had been filed with this Court, Judge Reese's wife, Dorothy Reese, and his sons, Justin and Jared Reese, filed lawsuits against the OLD in the United States District Court for the Eastern District of Louisiana for damages resulting from levee failures related to Hurricane Katrina.[4] In her lawsuit, Dorothy Reese, Judge Reese's wife, seeks compensation for damages to the property at xxx xxx xxx, the home she shared with Judge Kern Reese.[5] The

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[4] *Dorothy Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-4999, *Justin Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-5148; and *Jared Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, United States District Court, Eastern District of Louisiana, Civil Action No. 07-5150, attached as Exhibit "1".

[5] See Act of Cash Sale dated September 14, 2005, attached as Exhibit "2", whereby Judge Reese and Dorothy Reese purchased property in Baton Rouge, Louisiana. The buyers are

(Continued on following page)

lawsuits of Justin and Jared Reese seek compensation for damages to their respective homes. These complaints provided *new* evidence supporting OLD's contention that Judge Reese should be recused from this matter.

For example, the negligence allegations in the Dorothy Reese lawsuit against the OLD include, but are not limited to: deficiency in design and construction of the 17th Street Canal's levees and floodwalls, (¶90), negligently failing to install floodgates at the 17th Street Canal (¶91), inadequate design and build of levee and floodwall system on 17th Street Canal (¶91), negligent design and construction of I-walls extending 11 feet above ground, disregarding reports of weakened soil conditions (¶92), and failing to maintain and inspect properly the 17th Street Canal levee/floodwall (¶93). The negligence allegations include knowledge or constructive knowledge of the OLD regarding alleged design and construction deficiencies in light of the soil and the height and instability of the I-walls, (¶90). Damages alleged are those resulting from the levee failures that occurred during, or as a result of, Hurricane Katrina.

The allegations of the Reese federal complaints, although expanded and more comprehensive, are essentially identical to those

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listed as "Kern A. Reese and Dorothy F. Reese, both persons of the full age of majority, married and living together." Dorothy Farmer Reese is the wife of Judge Kern Reese.

alleged in the present matter, and the damages sought are those resulting from hurricane and flood effects, as in the case at bar. Although Judge Reese is not a named party, this complaint evidences Judge Reese's interest in the cause and its outcome. This interest in the cause and its outcome reflects Judge Reese's actual bias or prejudice against OLD in the present matter, since it relates to damages to his place of residence at the time of the storm.[6] His interest in the outcome of this matter is inextricable, as a finding of liability against OLD would undoubtedly influence the outcome of each of the Reeses' federal court actions.[7] Accordingly, Judge Bagneris should have recused Judge Reese from presiding over a matter that would have a significant influence over his wife and sons' cases, and a direct impact on an award of damages for his former residence.

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[6] *See* Exhibit "3", Transcript of May 21, 2008 hearing before Judge Bagneris, p. 23.

[7] See *Aetna Life Insurance Co., v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823. Judge Reese even recognized this interest when he recently recused himself in a related matter, on the grounds that he lives in the "defined footprint" of the action. Judge Reese noted that "living in the defined footprint of this action could make me a putative class member." *See Order of Recusal, Rodriguez, et al. v. Sewerage and Water Board of New Orleans, et. al.*, Civil District Court Docket No. 06-9763, attached as Exhibit "4".

ASSIGNMENT OF ERROR

1. The trial court erred in failing to recuse Judge Reese because the allegations that Judge Reese was biased, prejudiced and interested in the cause and its outcome were proven and constituted valid grounds for his recusation, pursuant to the U.S. Constitution, the La. Constitution, and La. Code of Civil Procedure, Article 151.

LAW AND ARGUMENT

I. Due Process guarantees the right to a fair and impartial tribunal. Actual bias by the tribunal is prohibited. Additionally, the possibility of unfairness must be prevented to promote the appearance of justice.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 2 of the Louisiana Constitution of 1974, guarantees to all litigants the right to a fair trial and an impartial tribunal. This right was jurisprudentially recognized by the U.S. Supreme Court in 1955, in *In Re Murchison*[8]:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always

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[8] *In Re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

> endeavored **to prevent even the probability of unfairness.** To this end **no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.**[9]

Additionally, the Due Process requirement of judicial impartiality was discussed by this Court in *Wilson v. City of New Orleans*[10]:

> The essential guarantee of the Due Process Clause is **fundamentally fair procedure** for the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property. Therefore, **there must be some type of neutral and detached decision maker**, be it judge, hearing officer or agency.[11] "[A]n impartial decision maker is essential" to due process.[12]

This Court continued:

> Due Process requires that **a decision maker not have a direct or indirect financial stake which would give a possible temptation to the average person as decision maker to make him partisan**

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[9] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625 (emphasis added).

[10] *Wilson v. City of New Orleans*, 479 So.2d 891 (La. 1985)

[11] *Wilson*, 479 So.2d at 901 (emphasis added).

[12] *Wilson*, 479 So.2d at 901 (citing *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970)).

> **towards maintaining his high level of revenue generated by his adjudicative function**. Even if an individual cannot show special prejudice in his particular case, **the situation in which an official occupies two inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process**. Nor may the initial factfinding process be deemed constitutionally acceptable simply because the government eventually offers a litigant an impartial de novo adjudication; he is entitled to a "neutral and detached judge in the first instance."[13]

The Louisiana Code of Civil Procedure provides a mechanism for recusal in instances when a judge is unable to fairly and impartially preside over certain matters. La. C.C.P. Art. 151 in effect at the time of the hearing, specifically provided:

> (B) A judge of any court, trial or appellate, may be recused when he:
>
> (4) Is the spouse of a party, or of an attorney employed in the cause; or is related to a party, or the spouse of the party, within the fourth degree; or is related to an attorney employed in the cause; or is the spouse of the attorney within the second degree.

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[13] *Wilson*, 479 So.2d at 901-902 (emphasis added) (citing *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); and *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct, 437, 71 L.Ed. 749 (1927)).

> (5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that he would be unable to conduct fair and impartial proceedings.[14]

The OLD submits that Judge Reese and his family are putative members of the class herein. Moreover, Judge Reese has a direct financial stake in this matter, which would give a possible temptation to the average person as decision maker, to make him partisan. The pending Dorothy Reese lawsuit against the OLD for hurricane damage to the former Reese home demonstrates Judge Reese's actual bias and prejudice against OLD, and his interest in this cause and its outcome. He clearly occupies two inconsistent positions, one partisan and the other judicial. Such necessarily involves an absence of due process were Judge Reese allowed to preside over this case, which mandates his recusal, as illustrated below.

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[14] La. C.C.P. Art. 151(A) (B)(4)-(5). Applicant notes that in the 2008 Regular Session, the Louisiana Legislature recognized the need to amend La. C.C.P. Art. 151, and made mandatory several provisions which were formerly permissive grounds for recusal. Through Act No. 663, the Legislature amended La. C.C.P. Art. 151(A) to provide, in part, that a judge of any court ***shall*** be recused when he is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys or any witness to such an extent that he would be unable to conduct fair and impartial proceedings. *See* La. C.C.P. Art. 151, as amended by Act 2008, No. 663, (emphasis added).

A. The allegations of the Dorothy Reese federal lawsuit demonstrate Judge Reese's actual prejudice against OLD which warrants recusal pursuant to the Due Process Clause of the Fourteenth Amendment.

Jurisprudence provides that recusation of a judge because of claims that he is biased or interested in the case to such an extent that he would be unable to conduct fair and impartial proceedings is **required in cases of actual bias or prejudice**.[15] In *Gibson v. Berryhill,*[16] the United States Supreme Court considered under what circumstances bias rose to such a level as to prohibit an administrative board from constitutionally presiding over a license revocation hearing. In *Gibson,* the Alabama Optometry Board ("Board") sought to revoke the licenses of several optometrists who practiced as employees of a corporation, Lee Optical, allegedly constituting the "unlawful practice" of optometry, in violation of Alabama law.[17] Shortly after the administrative charges were brought before the Board, the Board filed a lawsuit against Lee Optical, seeking to enjoin the company from the "unlawful practice of optometry."[18] The state

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[15] *Guidry v. First Nat. Bank of Commerce,* 1998-2383 (La.App. 4 Cir. 3/1/00), 755 So. 2d 1033 (emphasis added).

[16] *Gibson v. Berryhill,* 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973).

[17] *Gibson,* 411 U.S. at 567, 93 S. Ct. at 1692.

[18] *Gibson,* 411 U.S. at 568, 93 S. Ct. at 1693.

trial court granted the Board's injunction, prohibiting the corporation from employing the optometrists.[19]

The Board then resumed the administrative proceeding against the optometrists, seeking to revoke their licenses. In response, the optometrists filed a lawsuit in federal court, alleging Civil Rights violations, and seeking an injunction preventing the Board from hearing the pending charges.[20] Because the Board was composed only of those optometrists who were independent optometrists, not employed by others, those optometrists employed by Lee Optical alleged that the "Board was biased and could not provide the plaintiffs with a fair and impartial hearing in conformity with due process of law."[21]

The United States District Court noted that the Board, which served as judge and prosecutor in the de-licensing proceedings, had previously filed suit in state court against the plaintiffs for charges virtually identical to those before it in the administrative de-licensing proceeding.[22] **Considering the earlier lawsuit by the Board, the Board might have "preconceived opinions" regarding the charges pending before it.**[23] Second, because Lee Optical had a large business in Alabama, the Board members

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[19] *Gibson*, 411 U.S. at 569, 93 S. Ct. at 1693.

[20] *Gibson*, 411 U.S. at 569-570, 93 S. Ct. at 1693.

[21] *Gibson*, 411 U.S. at 570, 93 S. Ct. at 1693.

[22] *Gibson*, 411 U.S. at 571, 93 S. Ct. at 1694.

[23] *Gibson*, 411 U.S. at 571, 93 S. Ct. at 1694. (emphasis added).

stood to gain financially by suspending the optometry licenses of the Lee Optical employees.[24]

The District Court found the Board impermissibly biased for two reasons: (1) the Board had filed substantially identical charges against the optometrists in state court, evidencing the Board's prejudgment of the facts, and (2) the aim of the Board was to revoke the licenses of the optometrists who held one-half of the business in the State which would inure to the financial benefit of the Board members' optometry practices.[25] The District Court held that the Board's bias constitutionally disqualified the Board from presiding over the de-licensing proceedings.[26] The United States Supreme Court affirmed the District Court, opining: "It is sufficiently clear from cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."[27]

The rationale espoused in *Gibson* is decisive here. The Dorothy Reese lawsuit against OLD seeks

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[24] *Gibson*, 411 U.S. at 571, 93 S. Ct. at 1694.

[25] *Gibson*, 411 U.S. at 578, 93 S. Ct. at 1697-98.

[26] *Gibson*, 411 U.S. at 578, 93 S. Ct. at 1698.

[27] *Gibson*, 411 U.S. at 579, 93 S. Ct. at 1698 (citing *Tumey v. Ohio*, 47 S. Ct. 437, 441 (1927). Although *Tumey v. Ohio* involved the disqualification of a mayor to preside over a criminal action, which, upon conviction, provided funds to the city, the protections guaranteed by the Due Process Clause extend to both criminal and civil matters. *See Aetna Life Insurance Co., v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823.

compensation for flood damages to the home of Judge and Mrs. Reese. This lawsuit alleges OLD was negligent, and that OLD's negligence caused or led to the levee failures, which resulted in the flooding of the Reese's home. The allegations in the Dorothy Reese lawsuit compared to the plaintiffs' allegations in this case, vividly illustrate that Judge Reese has prejudged the facts of this case and possesses an actual bias and prejudice against OLD. Although Judge Reese is not listed as a party in the lawsuit, he testified to being a resident of the home at the time of the loss, and to suffering damages as a result of the loss.[28] Thus, the Dorothy Reese lawsuit evidences Judge Reese's belief that the OLD was negligent, and should be held liable for damages resulting from the flood.

Considering this evidence, allowing Judge Reese to preside and rule on the merits of the instant case directly contradict applicant's due process right to a fair tribunal and our system of law that "has always endeavored to prevent even the probability of unfairness."[29] Consequently, Judge Bagneris' failure to recuse Judge Reese from this matter denies OLD's due process right to a fair and impartial tribunal, and

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[28] *See* Exhibit "3", Transcript of May 21, 2008 hearing before Judge Bagneris, pp. 23 & 39.

[29] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625. Applicant's denial of due process is even more egregious in this instance when considering La. R.S. 13:5105, under which, OLD is not entitled to a jury trial. Thus, Judge Reese would not only be presiding over this matter, he would also be the trier of fact.

warrants this Court grant this writ application, and reverse the trial court's denial of applicant's Motion to Recuse Judge Reese.

B. Judge Reese's interest in the cause and outcome of this matter warrants recusal pursuant to the Due Process Clause of the Fourteenth Amendment.

Additionally, in determining whether recusal is warranted under the Due Process Clause, the United States Supreme Court has noted that a judge's interest in a case "cannot be defined with precision. Circumstances and relationships must be considered."[30] The circumstances presented by the present case are extreme, as they present more than mere *allegations* of bias and prejudice. "[I]t certainly violates the Fourteenth Amendment. . . . to subject [a person's] liberty or property to the judgment of a court, the judge of which, has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."[31]

La. C.C.P. Art. 151 B(5) in effect at the time of the hearing, was designed to prevent a judge from presiding over a cause when his spouse or family could be affected by the outcome. Facts which would

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[30] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625.

[31] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-22, 106 S. Ct. 1580, 1585, 89 L. Ed. 823 (1986) (citing *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L.Ed. 749 (1927)).

indicate that the judge would receive "some personal advantage" from deciding the case for or against one of the parties demonstrate a judge's interest in the cause. Louisiana jurisprudence has defined "interest in the cause" as follows:

> For a judge to have an interest in the cause within the meaning of [La. C.C.P. Art. 151 B(5)], some fact must exist that leads to the conclusion that **it is to the judge's personal advantage** . . . to decide the case or to seek to bring about a decision therein, for or against one of the parties to it.[32]

Moreover, the United States Supreme Court's reasoning in *Aetna Life Ins. Co. v. Lavoie,* is instructive. In *Aetna* the Supreme Court determined that an Alabama Supreme Court Justice could not participate in the decision of the Court regarding penalties against an insurer for bad-faith.[33] Justice Embry of the Alabama Supreme Court had a pending lawsuit against a different insurer, alleging bad faith. The United States Supreme Court reasoned: "We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey, Murchison,* and *Ward.* We make clear that **we are not required to decide whether in fact**

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[32] *Rollo v. Dison*, 402 So.2d 122 (La. App. 2d Cir. 1981), *writ denied,* 404 So. 2d 265 (La. 1981), quoting *State v. Pailet*, 246 La. 483, 165 So.2d 294 (1964) (emphasis added).

[33] *Aetna Life Ins, Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, L. Ed. 823 (1986)

Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true.'"[34] The Court did not determine that Justice Embry had been influenced, as it found that determination unnecessary. **The mere temptation to Justice Embry to rule against the insurer was sufficient to deprive the insurer of its Due Process rights.**

Similar to Justice Embry's predicament in *Aetna*, Judge Reese's interest in the outcome of the present matter is demonstrated as follows: (1) Judge Reese's wife and children have lawsuits pending in federal court against the OLD due to flood damages; (2) A finding of liability against the OLD in this litigation would influence the value of the Reeses' federal lawsuits; (3) A judgment or ruling adverse to the interests of the OLD in this litigation would influence the outcome of the federal litigation by creating collateral estoppel issues; and (4) Their federal complaints allege violations of Louisiana state law which,[35]

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[34] *Aetna Life Ins. Co.*, 475 U.S. at 825, 106 S. Ct. at 1587, 89 L. Ed. 823 (1986) (emphasis added), (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S. Ct. 80, 83, 34 L. Ed. 2d 267 (quoting *Tumey*, 273 U.S. at 532, 47 S. Ct. at 444)).

[35] *Dorothy Reese v. United States of America Board of Commissioners of the Orleans Levee District, et al.*; Exhibit "1", ¶¶11, 13.

pursuant to the Erie doctrine, must be decided in accordance with Louisiana state law. Thus, the determination of the state law issues in the present case would create precedent for determination of the state law issues in the federal lawsuits.

As a result, allowing Judge Reese to preside over this matter violates the Due Process Clause of the Fourteenth Amendment and La. C.C.P. Art. 151(B)(5) because he has a direct, personal, substantial, pecuniary interest in the outcome of this case. It is undoubtedly to Judge Reese's personal advantage to rule favorably on issues adverse to OLD in this matter since the outcome of this case will influence the Reese federal lawsuit. The advantage a judge, his spouse or children may obtain from a result in a related proceeding should not be gained from a suit that same judge presides over. "An interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal **even if that goal is not actually attained in that proceeding**."[36]

The evidence presented proves that Judge Reese has a sufficiently direct interest in the outcome of this case. By failing to recuse Judge Reese, the trial court's ruling allows Judge Reese to advance his personal interests and the interests of his family,

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[36] *Aetna Life Ins. Co.*, 475 U.S. 813, 830, 106 S. Ct. 1580, 1589-90, 89 L. Ed. 2d 823 (Brennan, J. concurring) (emphasis added).

since Judge Reese's rulings in this case will certainly influence the outcome of the federal lawsuits. Accordingly, Judge Bagneris erred in failing to recuse Judge Reese, which warrants this Court to grant this writ application.

C. Judge Reese, his wife, and his children are putative class members of the current lawsuit. Thus, Judge Reese has a pecuniary interest in certifying the class and rendering judgment against OLD.

As residents, domiciliaries, and property owners in Orleans Parish who suffered damages as a result of levee breaches, Judge Reese, his wife, and his children are clearly putative class members as defined in the present litigation. Thus, Judge Reese has a pecuniary interest in the proposed class action which mandates his recusal.

La. Code Civ. Proc. Art. 151 B(4), in effect at the time of the hearing, authorized recusal when the judge, his spouse, or a family member is a party to the litigation. As evidenced by the federal court pleadings, Judge Reese's home was flooded, thereby affording him and his wife status as putative class members. This warrants recusal pursuant to La. Code Civ. Proc. art. 151 B(4). It is noteworthy that this codal provision does *not* require a showing of bias or prejudice; indeed the status of the judge, his spouse, or relative as a putative class member is sufficient for recusal.

In discussing Article 151 B(4), the Supreme Court, in *In Re Cooks,* held that a judge's recusal is essentially mandated in the event that his spouse is a party, stating:

> Although the Article 151 B(4) says the judge 'may' be recused [where the judge is the spouse of a party], we can foresee no instances where a judge would not be required to recuse himself where he is the spouse of a party . . . in the cause.[37]

The express language of the article, coupled with the interpreting jurisprudence as set forth in *In Re Cooks,* undoubtedly leads to the conclusion that **bias, prejudice and interest on the part of the judge are presumed where a spouse or other family member within the fourth degree is a party to the case**. As a result, considering Judge Reese, his wife, and his children are putative class members in the subject litigation, La. Code Civ. Proc. art. 151 B(4) militates in favor of recusing Judge Reese from presiding over this proceeding.

CONCLUSION

The Due Process Clause of the U.S. Constitution and the La. Constitution of 1974 guarantees to every litigant the right to a fair trial and impartial tribunal. Moreover, La. C.C.P. Art. 151 requires recusal of

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[37] *In Re Cooks*, 96-1147 (La. 5/20/97), 694 So. 2d 892, 903.

a judge that has actual bias, prejudice, or an interest in the cause or its outcome. The filing of the Reese lawsuits in federal court against the OLD, with allegations essentially identical to those made by the plaintiff's against OLD in this matter, demonstrates Judge Reese's actual bias in this case, as well as his interest in this cause and its outcome, both valid grounds **requiring** his recusation. As such, Judge Bagneris' failure to recuse Judge Reese violates the Due Process Clauses of the U.S. and La. Constitutions, and La. C.C.P. Art. 151.

For these reasons, applicant, The Board of Commissioners of the Orleans Levee District, respectfully requests that this Honorable Court exercise its supervisory jurisdiction, grant this writ application, and REVERSE the trial court's May 23, 2008 Judgment denying applicant's Motion to Recuse Judge Kern A. Reese.

Respectfully submitted,

/s/ Kyle Kirsch
Thomas P. Anzelmo, T.A. (#2533)
Mark E. Hanna (#19336)
Kyle P. Kirsch (#26363)
Andre J. Lagarde (#28649)
McCRANIE, SISTRUNK, ANZELMO,
HARDY, MAXWELL & McDANIEL
3445 N. Causeway Boulevard, Ste. 800
Metairie, LA 70002
TELEPHONE: (504) 831-0946
FACSIMILE: (504) 831-2492

and

Ben L. Mayeaux #19042
James L. Pate #10333
One Petroleum Center, Suite 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
TELEPHONE: (337) 237-7000
FACSIMILE: (337) 233-9450

AFFIDAVIT VERIFYING ALLEGATIONS AND SERVICE
STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, a Notary Public in and for the said Parish, State of Louisiana, personally came and appeared:

KYLE P. KIRSCH

who, being by me first duly sworn did depose and say:

That he is attorney for in this case; that he has read the above and foregoing Application for Supervisory Writs; that all of the allegations contained therein are true and correct to the best of his knowledge and that copies of this Application for Supervisory Writs were duly served on the following:

Hon. Michael Bagneris
Civil District Court
Parish of Orleans
421 Loyola Avenue,
Rm. 304
New Orleans, La. 70112

Hon. Kern A. Reese
Judge, Division "L"
Civil District Court for
the Parish of Orleans
421 Loyola Avenue
New Orleans, La. 70112

Darleen M. Jacobs, Esq.
Al A. Sarrat, Esq.
Jacobs & Sarrat
823 St. Louis Street
New Orleans, La. 70112
Attorneys for Plaintiffs

Charles M. Lanier, Esq.
Christovich & Kearney
601 Poydras Street,
Suite 2300
New Orleans, La. 70130
Attorneys for Sewerage
and Water Board of
New Orleans

Timothy W. Hassinger, Esq.
Galloway, Johnson,
Thompkins, Burr
& Smith
701 Poydras Street,
Suite 4040
New Orleans, La. 70139
Attorneys for the State
of Louisiana/
Dept. of Transportation
& Development

The Hon. Danielle Schott
Clerk of Court
Louisiana Fourth
Circuit Court of Appeal
400 Royal Street
New Orleans, LA
70130-2199

by electronic transmission and by depositing a copy of same in the United States mail, postage prepaid and properly addressed.

/s/ Kyle Kirsch
KYLE P. KIRSCH

SWORN TO AND SUBSCRIBED BEFORE ME, Notary, this 27th day of August, 2008.

/s/ Jason B. Thrower
NOTARY PUBLIC
No. 84193
Identification Number

Jason B. Thrower
Notary Public # 84193
State of Louisiana
My commission is for life.
La. Bar No. 30761

STATE OF LOUISIANA

SUPREME COURT

NO. _____

SUSAN AND WILLIAM LAURENDINE, ET AL
Plaintiffs/Respondents

VERSUS

THE BOARD OF COMMISSIONERS
FOR THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS, ET AL
Defendants/Applicants

APPLICATION FOR SUPERVISORY WRITS
TO REVIEW THE DENIAL OF DEFENDANT'S
MOTION TO RECUSE JUDGE MICHAEL L.
BAGNERIS CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS, STATE OF LOUISIANA,
NO. 05-11660, DIVISION "H"
HONORABLE MICHAEL G. BAGNERIS,
PRESIDING FOURTH CIRCUIT COURT
OF APPEAL, NO. 2008-C-0822
WRIT DENIED JULY 28, 2008
JUDGES LANDRIEU, ARMSTRONG, TOBIAS

ORIGINAL APPLICATION ON BEHALF OF
THE BOARD OF COMMISSIONERS FOR THE
ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS

CIVIL PROCEEDING

Respectfully submitted,

/s/ Kyle P. Kirsch
Thomas P. Anzelmo, T.A. (#2533)
Mark E. Hanna (#19336)
Kyle P. Kirsch (#26363)
Andre J. Lagarde (#28649)
McCRANIE, SISTRUNK, ANZELMO, HARDY, MAXWELL & McDANIEL
3445 N. Causeway Blvd., Suite 800
Metairie, Louisiana 70002
Telephone: (504) 831-0946
Facsimile: (504) 831-2492

James L. Pate (#10333)
Ben L. Mayeaux (#19042)
LABORDE & NEUNER
One Petroleum Center, Ste. 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
Telephone: (337) 237-7000
Facsimile: (337) 233-9450

ATTORNEYS FOR THE BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT

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STATEMENT OF WRIT GRANT CONSIDERATIONS SATISFIED PURSUANT TO RULE X, SECTION 1(a)

Louisiana Code of Civil Procedure article 154 mandates that when presented with valid grounds in a Motion to Recuse, the judge must either recuse himself, or refer the motion to another judge for hearing. In the May 21, 2008 hearing on a Motion to Recuse Judge Michael Bagneris from hearing a Motion to Recuse Judge Kern Reese, Judge Bagneris did neither of these. Judge Bagneris refusal to recuse himself or re-allot the motion to another judge contravened the mandates of the Code of Civil Procedure, as well as the Canons of Judicial Conduct, and such decision warrants this Court's exercise of supervisory jurisdiction as provided by La. Sup. Ct. Rule X1(a)(4) and (5).

Plaintiffs filed a Petition for Damages against the Orleans Levee District ("OLD") for damages sustained as a result of the levee breaches that occurred during Hurricane Katrina. Plaintiffs have sought class certification of this matter, Judge Bagneris and his wife, Madlyn, subsequently filed a

complaint against the OLD in the United States District Court for the Eastern District of Louisiana, ("The Bagneris Suit"). The Bagneris suit alleges OLD was negligent in various and numerous respects for the levee failures, and seeks compensation for property damage to the Bagneris' home. Indeed, the allegations of OLD's negligence in the Bagneris suit are almost identical to those made by the plaintiffs in this case. Consequently, OLD filed a Motion to Recuse Judge Bagneris from hearing the Motion to Recuse Judge Kern Reese from this case, on the grounds that Judge Bagneris is biased in favor of the plaintiffs and prejudiced against the OLD, and he has a pecuniary interest in the outcome of this matter.

RULE X1(a)(4): ERRONEOUS INTERPRETATION OR APPLICATION OF CONSTITUTION OR LAWS.

Once a "valid ground for recusation" is provided, **the Code of Civil Procedure mandates that the judge either recuse himself or refer the matter to another judge for hearing.**[1] **"Once a motion to recuse has been filed, a judge has no power to act, and any action taken by that judge is an absolute nullity."**[2] Thus, Judge Bagneris had no legal authority to hear his own recusal motion after

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[1] La. C.C.P. Art. 154.

[2] *In Re: Judge Martha Sassone*, 07-0651 (La. 6/29/07) (citing *State v. Price*, 274 So. 2d 194, 197 (La. 1973)).

being presented valid grounds for his recusal, and his actions in proceeding to hear his own recusal motion were in direct violation of Louisiana Code of Civil Procedure article 154, and warrant the exercise of supervisory jurisdiction by this Honorable Court. La. Sup. Ct. Rule X1(a)(4).

Additionally, Judge Bagneris and the Fourth Circuit erroneously interpreted the law as set forth in the United States and Louisiana Constitutions, and the Louisiana Code of Civil Procedure. The courts denied the Motion to Recuse Judge Bagneris, concluding that bias on the part of Judge Bagneris had not been shown. In so doing, both courts ignored the due process provisions which guarantee Defendant's right to a fair and impartial tribunal, and the provisions of La. C.C.P. Art. 151, which suggest a judge's recusal when it has been demonstrated the judge is biased, or has an interest in the outcome of the matter. Accordingly, these erroneous interpretations warrant the exercise of this Court's supervisory jurisdiction pursuant to La. Sup. Ct. Rule X1(a)(4).

RULE X1(a)(5): GROSS DEPARTURE FROM PROPER JUDICIAL PROCEEDINGS

The judge's actions also constitute a departure from proper judicial proceedings. La. Sup. Ct. Rule X1(a)(5). "An independent and honorable judiciary is indispensable to justice in our society." (Code of Judicial Conduct, Canon 1). The Code of Judicial

Conduct mandates that a judge "avoid impropriety and the appearance of impropriety in all activities." (Code of Judicial Conduct, Canon 2). Judge Bagneris became aware that he had filed a federal complaint which was pending at the time of the hearing of his recusal motion. Judge Bagneris even candidly recognized on the record that he would recuse on "appearance" grounds if he were presiding over the merits of the case. Nevertheless, he saw no need to, and ultimately failed to recuse himself from hearing a Motion to Recuse a judge who would preside over the merits. Judge Bagneris' failure to recuse himself not only ignores the Code of Judicial Conduct, it also disregards the mandates of the Code of Civil Procedure. Judge Bagneris' decision, and the Fourth Circuit's sanctioning of the same, constitute a departure from proper judicial proceedings and violate Defendant's right to a fair and impartial tribunal.

It is inconceivable to suggest or believe that a judge with a pending lawsuit against the same defendant herein, with essentially the same allegations of negligence as made by the plaintiff herein, could be impartial in hearing a Motion to Recuse another judge from hearing the merits of this case. Even accepting the presumption of the judge's impartiality, his involvement in selecting the tribunal that would preside over a case that undoubtedly will affect his cause of action against the same defendant does not comply with either the Canons of Judicial Conduct or the Code of Civil Procedure. The lower courts have ignored the controlling legislation and engaged in and

sanctioned conduct that is a departure from proper judicial proceedings. **Legislation cannot be disregarded by the judiciary.** Thus, the exercise of this Honorable Court's supervisory jurisdiction is warranted under La. Sup. Ct. Rule X1(a)(4) and (5).

SUGGESTED DISPOSITION: **Grant with order.** Because of his bias and interest in the outcome of this case, Judge Bagneris was required to either recuse himself from this matter or to re-allot the Motion to Recuse to a judge who is competent to hear the Motion. His failure to do so violates the United States and Louisiana Constitutions, the Louisiana Code of Civil Procedure and the Canons of Judicial Conduct. Therefore, this Court should grant this writ application, recuse Judge Bagneris from hearing the Motion to Recuse Judge Reese, declare his decision null, and re-allot the Motion to be heard by a judge ad-hoc.

STATEMENT OF THE CASE

On September 24, 2005, plaintiffs instituted the present litigation, naming the Orleans Levee District ("OLD") as defendant, seeking damages that resulted from Hurricane Katrina. In their original "Claim for Damages," plaintiffs alleged negligence of the OLD as follows:

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a. Designing and installing concrete flood walls which were below standard and potentially unstable in a flood;

b. Failing to test the flood walls for their ability to withstand cascades of lake water that may push over levees during a hurricane;

c. Failing to interlock the flood walls and/or place a top railing or similar system to bind the walls together.

Plaintiffs further averred that "the number of business and property owners affected by the negligence of the defendant are too numerous to mention," and thus, sought class certification for "all residents, business owners, and occupants of the affected areas."

By a First Supplemental and Amending Petition, plaintiffs re-designated the named plaintiffs and added additional theories of negligence against the defendant, OLD, to wit:

d. Failing to inspect and maintain the levees after their completion;

e. Failing to insure that the proper soil was used in the construction of the levee.

The putative class was also expanded to include "all residents (sic) domiciliary (sic) and property owners of the Parishes of Orleans and Jefferson" "who were affected by the flooding caused by the failure of the hurricane protection levees and flood wall (sic) in New Orleans."

By a Second Supplemental and Amending Petition, plaintiffs named additional defendants, and re-averred all allegations of negligence against OLD. The putative class was then redefined as:

> All residents, domiciliaries, property owners and business owners of the parishes of Orleans and Jefferson in the State of Louisiana whose persons, properties or businesses were damaged by flooding caused by the failure of the 17th Street Canal and London Avenue Canal hurricane protection levees and floodwalls in New Orleans, Louisiana on or after August 29, 2005, who may suffer such injury or damage in the future as a result thereof or who have sustained a justifiable fear of sustaining such injury or damage in the future as a result thereof.

OLD filed a Motion to Recuse all judges of the Civil District Court for the Parish of Orleans on August 30, 2006. On October 26, 2006, the Honorable Kern Reese, to whom this matter was originally allotted, executed an Order to Re-Allot, in which Judge Reese declined to recuse himself, and requested that defendant's Motion to Recuse be re-allotted to another division for hearing thereon. Thereafter, this matter was re-alloted twice more after the OLD filed individual Motions to Recuse Judge Piper Griffin and Judge Robin Giarrusso. Upon Judge Giarrusso's order that the Clerk of Court, the Honorable Dale Atkins, re-allot this matter for recusal only, the original Motion was re-allotted to Judge Michael Bagneris.

On February 15, 2007, OLD filed an individual Motion to Recuse Judge Michael Bagneris from hearing the Motion to Recuse Judge Reese. On April 30, 2007, Judge Bagneris denied the Motion to

Recuse Judge Bagneris. The OLD filed an application for supervisory writs with the Fourth Circuit, which was denied on June 25, 2007. OLD filed an application for supervisory writs with this Supreme Court which was denied October 12, 2007.

However, on September 4, 2007, ***after*** denying the OLD's Motion to Recuse, and after OLD's writ application had been filed with this Court, Judge Bagneris, along with his wife, Madlyn, filed a complaint against the OLD in the United States District Court for the Eastern District of Louisiana,[3] seeking compensation for property damage to their home at xxx xxx xxx, New Orleans, Louisiana. This complaint provided *new* evidence supporting OLD's contention that Judge Bagneris should be recused from this matter.

Judge Bagneris' negligence allegations against the OLD include, but are not limited to: deficiency in design and construction of the 17th Street Canal's levees and floodwalls, (¶ 115), negligently failing to install floodgates at the 17th Street Canal (¶116), inadequate design and build of levee and floodwall system on 17th Street Canal (¶116), negligent design and construction of I-walls extending 11 feet above

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[3] *See* Exhibit "1", Civil Action No. 07-5378 entitled "*Michael G. and Madlyn P. Bagneris vs. United States of America, Board of Commissioners of the Orleans Levee District, et al.,*" which includes Form 95 of the Dept. of Justice, Claim for Damage, Injury or Death. That form lists Madlyn and Michael Bagneris as witnesses.

ground, disregarding reports of weakened soil conditions (¶ 117), and failing to maintain and inspect properly the 17th Street Canal levee/floodwall (¶ 118). The negligence allegations include knowledge or constructive knowledge of the OLD regarding alleged design and construction deficiencies in light of the soil and the height and instability of the I-walls (¶ 115). Damages alleged are those resulting from the levee failures that occurred during, or as a result of, Hurricane Katrina.

The allegations of Judge Bagneris' federal complaint, although expanded and more comprehensive, are essentially identical to those alleged in the present matter, and the damages sought are those resulting from hurricane and flood effects, as in the case at bar. This complaint evidences Judge Bagneris' pre-judgment of the facts of this case, and his belief that the OLD was negligent, and liable for the levee failures during Hurricane Katrina. This pre-judgment of the facts and predetermination of liability against OLD reflects Judge Bagneris' actual bias in the present matter. It also reveals his inextricable interest in the outcome of this matter, since finding OLD liable here would undoubtedly influence the outcome of the federal court actions.[4]

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[4] See *Aetna Life Insurance Co., v. Lavoie,* 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823.

ASSIGNMENT OF ERROR

1. The trial court erred in hearing the Motion to Recuse Judge Bagneris from the Motion to Recuse Judge Reese because the allegations that Judge Bagneris was biased, prejudiced and interested in the cause and its outcome were proven, and constituted valid grounds for his recusation, pursuant to the U.S. Constitution, the Louisiana Constitution, and Louisiana Code of Civil Procedure, Article 151, in effect on the date of the hearing.

LAW AND ARGUMENT

I. Due Process guarantees the right to a fair and impartial tribunal. Actual bias by the tribunal is prohibited. Additionally, the possibility of unfairness must be prevented to promote the appearance of justice.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 2 of the Louisiana Constitution of 1974, guarantees to all litigants the right to a fair trial and an impartial tribunal. This right was jurisprudentially recognized by the U.S. Supreme Court in 1955, in *In Re Murchison*[5]:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course

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[5] *In Re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955).

> requires an absence of actual bias in the trial of cases. But our system of law has always endeavored **to prevent even the probability of unfairness**. To this end **no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome**.[6]

Additionally, the Due Process requirement of judicial impartiality was discussed by this Court in *Wilson v. City of New Orleans*[7]:

> The essential guarantee of the Due Process Clause is **fundamentally fair procedure** for the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property. Therefore, **there must be some type of neutral and detached decision maker**, be it judge, hearing officer or agency.[8] "[A]n impartial decision maker is essential" to due process.[9]

This Court continued:

> Due Process requires that **a decision maker not have a direct or indirect financial stake which would give a possible**

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[6] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625 (emphasis added

[7] *Wilson v. City of New Orleans*, 479 So.2d 891 (La. 1985).

[8] *Wilson*, 479 So.2d at 901 (emphasis added).

[9] *Wilson*, 479 So.2d at 901 (citing *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970)).

> **temptation to the average person as decision maker to make him partisan towards maintaining his high level of revenue generated by his adjudicative function.** Even if an individual cannot show special prejudice in his particular case, **the situation in which an official occupies two inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process.** Nor may the initial factfinding process be deemed constitutionally acceptable simply because the government eventually offers a litigant an impartial de novo adjudication; he is entitled to a "neutral and detached judge in the first instance."[10]

A. The allegations of Judge Bagneris' federal lawsuit demonstrate his prejudgment of the facts of this case and warrant recusal pursuant to the Due Process Clause of the Fourteenth Amendment.

In *Gibson v. Berryhill,*[11] the United States Supreme Court considered under what circumstances bias rose to such a level as to prohibit an

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[10] *Wilson,* 479 So.2d at 901-902 (emphasis added) (citing *Ward v Monroeville,* 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); and *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

[11] *Gibson v. Berryhill* 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973).

administrative board from constitutionally presiding over a license revocation hearing. In *Gibson,* the Alabama Optometry Board ("Board") sought to revoke the licenses of several optometrists who practiced as employees of a corporation, Lee Optical, allegedly constituting the "unlawful practice" of optometry, in violation of Alabama law.[12] Shortly after the administrative charges were brought before the Board, the Board filed a lawsuit against Lee Optical, seeking to enjoin the company from the "unlawful practice of optometry."[13] The state trial court granted the Board's injunction, prohibiting the corporation from employing the optometrists.[14]

The Board then resumed the administrative proceeding against the optometrists, seeking to revoke their licenses. In response, the optometrists filed a lawsuit in federal court, alleging Civil Rights violations, and seeking an injunction preventing the Board from hearing the pending charges.[15] Because the Board was composed only of those optometrists who were independent optometrists, not employed by others, those optometrists employed by Lee Optical alleged that the "Board was biased and could not

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[12] *Gibson,* 411 U.S. at 567, 93 S. Ct. at 1692.

[13] *Gibson,* 411 U.S. at 568, 93 S. Ct. at 1693.

[14] *Gibson,* 411 U.S. at 569, 93 S. Ct. at 1693.

[15] *Gibson,* 411 U.S. at 569-570, 93 S. Ct. at 1693.

provide the plaintiffs with a fair and impartial hearing in conformity with due process of law."[16]

The United States District Court noted that the Board, which served as judge and prosecutor in the de-licensing proceedings, had previously filed suit in state court against the plaintiffs for charges virtually identical to those before it in the administrative de-licensing proceeding.[17] **Considering the earlier lawsuit by the Board, the Board might have "preconceived opinions" regarding the charges pending before it.**[18] Second, because Lee Optical had a large business in Alabama, the Board members stood to gain financially by suspending the optometry licenses of the Lee Optical employees.[19]

The District Court found the Board impermissibly biased for two reasons: (1) the Board had filed substantially identical charges against the optometrists in state court, evidencing the Board's prejudgment of the facts, and (2) the aim of the Board was to revoke the licenses of the optometrists who held one-half of the business in the State, which would inure to the financial benefit of the Board members' optometry practices.[20] The District Court

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[16] *Gibson*, 411 U.S. at 570, 93 S. Ct. at 1693.

[17] *Gibson*, 411 U.S. at 571, 93 S. Ct. at 1694.

[18] *Gibson*, 411 U.S. at 571, 93 S. Ct. at 1694. (emphasis added).

[19] *Gibson*, 411 U.S. at 571, 93 S. Ct. at 1694.

[20] *Gibson*, 411 U.S. at 578, 93 S. Ct. at 1697-98.

held that the Board's bias constitutionally disqualified the Board from presiding over the de-licensing proceedings.[21] The United States Supreme Court affirmed the District Court, opining: "It is sufficiently clear from cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."[22]

The rationale espoused in *Gibson* is decisive here. In his federal court lawsuit, Judge Bagneris alleges OLD was negligent, and that OLD's negligence caused or led to the levee failures which resulted in the flooding of his home. **As a result, the assertion that Judge Bagneris has pre-judged the facts of *this* case cannot be disputed, since his claims are essentially the sum and substance of the claims made by the plaintiffs in this matter. The allegations of Judge Bagneris' lawsuit provide clear evidence of his belief that the OLD was negligent, and should be held liable for damages resulting from the flood.**

Thus, the allegations of Judge Bagneris' lawsuit demonstrate his actual bias and interest in the

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[21] *Gibson*, 411 U.S. at 578, 93 S. Ct. at 1698.

[22] *Gibson*, 411 U.S. at 579, 93 S. Ct. at 1698 (citing *Tumey v. Ohio*, 47 S. Ct. 437, 441 (1927). Although *Tumey v. Ohio* involved the disqualification of a mayor to preside over a criminal action, which, upon conviction, provided funds to the city, the protections guaranteed by the Due Process Clause extend to both criminal and civil matters. See *Aetna Life Insurance Co., v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823.

outcome of the matter in which the Motion to Recuse Judge Reese is pending. In failing to recuse himself, or re-allot the Motion to Recuse Judge Reese, Judge Bagneris is effectively exercising his judgment over a matter in which he has an actual bias and interest, by single-handedly selecting the tribunal over a matter whose outcome will significantly impact his own case. This is in direct contradiction to Due Process and our system of law that "has always endeavored to prevent even the probability of unfairness."[23] Consequently, Judge Bagneris erred in his refusal to recuse himself or re-allot this matter, which requires this writ application be granted by this Honorable Court.

B. Judge Bagneris' pecuniary interest in the outcome of this matter warrants recusal pursuant to the Due Process Clause of the Fourteenth Amendment.

In determining whether recusal is warranted, the United States Supreme Court has noted that a judge's interest in a case "cannot be defined with precision. Circumstances and relationships must be considered."[24] The circumstances presented by the present case are extreme, as they present more than mere *allegations* of bias and prejudice. "[I]t certainly violates the Fourteenth Amendment. . . . to subject [a

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[23] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625.

[24] *In Re Murchison*, 349 U.S. at 136, 75 S. Ct. at 625.

person's] liberty or property to the judgment of a court, the judge of which, has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."[25] The Court also made it clear that recusal on a Due Process violation need not be based on actual bias. "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, '**justice must satisfy the appearance of justice.**'"[26]

In *Aetna Life Ins. Co. v. Lavoie,* the United States Supreme Court concluded that an Alabama Supreme Court Justice could not participate in the decision of the Court regarding penalties against an insurer for bad-faith.[27] Justice Embry of the Alabama Supreme Court had a pending lawsuit against a different insurer, alleging bad faith. The United States Supreme Court held: "We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in *Tumey, Murchison,* and

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[25] *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 821-22, 106 S. Ct. 1580, 1585, 89 L. Ed. 823 (1986) (citing *Tumey v. Ohio,* 273 U.S.510, 523, 47 S. Ct. 437, 441, 71 L.Ed. 749 (1927)).

[26] *Aetna Life Ins. Co.,* 475 U.S. at 825, 106 S. Ct. at 1587, 89 L. Ed. 823 (1986) (emphasis added) (citing *In Re Murchison,* 349 U.S. at 136, 75 S. Ct. at 625).

[27] *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. at 813, 106 S. Ct. 1580, L. Ed. 823 (1986)

Ward. We make clear that **we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true.'"**[28] The Court did not determine that Justice Embry had been influenced, as it found that determination unnecessary. **The mere temptation to Justice Embry to rule against the insurer was sufficient to deprive the insurer of its Due Process rights.**

Similar to Justice Embry's predicament in *Aetna,* Judge Bagneris' dilemma in presiding over the Motion to Recuse himself is demonstrated as follows: (1) Judge Bagneris and his wife have a pending lawsuit in federal court against the OLD for flood damages to their home; (2) A finding of liability against the OLD would influence the value of the Bagneris federal lawsuit; (3) A judgment or ruling adverse to the interests of the OLD in this litigation would influence the outcome of the Bagneris federal suit by creating collateral estoppel issues; and (4) The federal complaint alleges violations of Louisiana state law

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[28] *Aetna Life Ins. Co.*, 475 U.S. at 825, 106 S. Ct. at 1587, 89 L. Ed. 823 (1986) (emphasis added), (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S. Ct. 80, 83, 34 L. Ed. 2d 267 (quoting *Tumey*, 273 U.S. at 532, 47 S. Ct. at 444)).

which,[29] pursuant to the Erie doctrine, must be decided in accordance with Louisiana state law. Thus, the determination of the state law issues in the present case would create precedent for determination of the state law issues in the federal lawsuits.

As a result, allowing Judge Bagneris to preside over his own recusal motion violates the Due Process Clause of the Fourteenth Amendment because he has a direct, personal, substantial, pecuniary interest in the outcome of this case. The advantage to be obtained by the judge should not be gained from the proceeding over which he presides. "An interest is sufficiently 'direct' if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal **even if that goal is not actually attained in that proceeding**."[30] Judge Bagneris has a proven, direct pecuniary interest in the outcome of this case. By failing to recuse himself, and further declining to recuse Judge Reese, with knowledge of the fact that Judge Reese's wife and sons have pending lawsuits against the OLD, Judge Bagneris' interests in his own lawsuit are advanced, since Judge Reese's continued presiding over the present matter is certain to influence the

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[29] *See* Exhibit 1, *Michael G. and Madelyn P. Bagneris v. United States of America Board of Commissioners of the Orleans Levee District, et al.*, at ¶¶15, 17.

[30] *Aetna Life Ins. Co.*, 475 U.S. 813, 830, 106 S. Ct. 1580, 1589-90, 89 L. Ed. 2d 823 (Brennan, J. concurring) (emphasis added).

outcome of each of the federal lawsuits, including the Bagneris suit. Accordingly, Judge Bagneris erred in not recusing himself or re-alloting this matter, which necessitates this Court grant this writ application, recuse Judge Bagneris from hearing the Motion to Recuse Judge Reese, declare his action a nullity, and re-allot the Motion to be heard by a judge ad-hoc.

II. JUDGE BAGNERIS WAS REQUIRED BY LAW TO RECUSE HIMSELF OR RE-ALLOT THE MATTER ONCE VALID GROUNDS FOR HIS RECUSATION WERE PRESENTED.

The Louisiana Code of Civil Procedure recognizes the inability of a judge to fairly and impartially preside over certain matters, and provides a mechanism for recusal. At the time of the hearing, La. C.C.P. Art. 151 specifically provided:

> (B) A judge of any court, trial or appellate, may be recused when he:
>
> (4) Is the spouse of a party, or of an attorney employed in the cause; or is related to a party, or the spouse of the party, within the fourth degree; or is related to an attorney employed in the cause; or is the spouse of the attorney within the second degree.
>
> (5) Is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys to such an extent that

> he would be unable to conduct fair and impartial proceedings.[31]

Although the cited provisions provide permissive bases for recusal, jurisprudence provides that recusation of a judge under La. C.C.P. Art. 151B(5) **is required in cases of actual bias or prejudice.**[32] Moreover, La. C.C.P. Art. 154 provides the proper procedure for recusal of judges, in pertinent part, as follows: "If a valid ground for recusation is set forth in the motion, the judge **shall** either recuse himself, or refer the motion to another judge or a judge ad hoc, as provided in Articles 155 and 156, for a hearing."[33]

Additionally, the Code of Judicial Conduct recognizes that a judge should be recused in any matter in which his **impartiality might even be questioned:**

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[31] La. Code of Civ. Pro. art. 151B.(4)-(5).

[32] *Guidry v. First Nat. Bank of Commerce,* 1998-2383 (La. App. 4th Cir. 3/1/00), 755 So. 2d 1033, 1038-1039 (emphasis added). Applicant notes that in the 2008 Regular Session, the Louisiana Legislature recognized the need to amend La. C.C.P. Art. 151, and made mandatory several provisions which were formerly permissive grounds for recusal. Through Act No. 663, the Legislature amended La. C.C.P. Art. 151(A) to provide, in part, that a judge of any court ***shall*** be recused when he is biased, prejudiced, or interested in the cause or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys or any witness to such an extent that he would he unable to conduct fair and impartial proceedings. *See* La. C.C.P. Art. 151, as amended by Act 2008, No. 663, (emphasis added).

[33] La. Code Civ. Proc. art. 154 (emphasis added).

> A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule.[34]

Interestingly, Judge Bagneris recognized *this* obligation on the record of the hearing of the Motions to Recuse, as well as in his written Reasons for Judgment in those matters, by noting that "if he were presiding over the merits of this case he would recuse himself pursuant to Canon 3(C) – the appearance of impropriety."[35]

Unfortunately, Judge Bagneris failed to recuse himself from the hearing, or re-allot the matter pursuant to law, despite being presented valid grounds for his own recusation. The Fourth Circuit agreed with the trial court, finding that the OLD "produced no evidence of bias on the part of Judge Michael Bagneris to preside over the hearing on the relator's motion to recuse Judge Kern A. Reese . . . "[36]

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[34] Canon 3(C) of the Code of Judicial Conduct. The Honorable Judge Robin Giarrusso recused herself from related flood litigation in *Brubbacher v. Board of Commissioners for the Orleans Levee District, et al,* Case no. 2006-9775. Additionally, Judges Cade, Medley and Ledet have also recused themselves in matters involving flood litigation resulting from Hurricane Katrina.

[35] *See Appendix,* Exhibit "B" Trial Court Reasons for Judgment.

[36] *See Appendix,* Exhibit "C" Fourth Circuit Writ Denial.

This conclusion, however, ignores the fact that evidence *was* presented which showed Judge Bagneris and his wife filed a federal lawsuit against OLD with allegations essentially identical to the present case.[37] Moreover, Judge Bagneris was aware of the fact Judge Reese's wife and children had filed federal lawsuits against OLD with allegations essentially identical to the present case.

By allowing Judge Bagneris to preside over the Motion to Recuse Judge Reese, after filing his own lawsuit against OLD and knowing Judge Reese's wife and sons had pending lawsuits against OLD, the Fourth Circuit effectively sanctioned Judge Bagneris' selection of the tribunal over a matter whose outcome would have a substantial impact on his own case. In circumstances where the grounds for recusation are not frivolous or invalid on the face of the pleading, the judge is **prohibited from both refusing to recuse himself and dismissing the motion.**[38]

In this instance, the grounds set out in defendant's Motion to Recuse Judge Bagneris were neither frivolous nor invalid. Moreover, they demonstrated Judge Bagneris' actual bias and interest in the case and its outcome, as well as his bias or prejudice

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[37] *See Exhibit 1, Michael G, and Madelyn P. Bagneris v. United States of America Board of Commissioners of the Orleans Levee District, et al.*

[38] *Roy v. Roy*, 285 So. 2d 867, 869 (La. App. 4th Cir. 1973) (emphasis added).

against OLD to such an extent that he would be unable to conduct fair and impartial proceedings. Consequently, Judge Bagneris' recusal in this matter is required by law. Judge Bagneris' failure to recuse himself or refer the motion was error, and calls for this Court to grant this writ application, recuse Judge Bagneris from hearing the Motion to Recuse Judge Reese, declare his decision a nullity, and re-allot the Motion to be heard by a judge ad-hoc.

CONCLUSION

The Due Process Clause of the Fourteenth Amendment and the Louisiana Constitution of 1974, guarantee to every litigant the right to a fair trial and impartial tribunal, Judge Bagneris' filing of a lawsuit in federal court against OLD, with allegations essentially identical to those made by the plaintiffs against OLD in this matter, demonstrates his actual bias in this case. This coupled with his knowledge of the pending Reese federal lawsuits, "would offer a possible temptation to lead him not to hold the balance nice, clear and true"[39] in deciding whether Judge Reese would be impartial in hearing this matter on the merits. As such, Judge Bagneris' hearing of the Motion to Recuse himself violated the Due Process Clause of the Fourteenth Amendment.

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[39] *Aetna Life Ins. Co.*, 475 U.S. at 825, 106 S. Ct. at 1587, 89 L. Ed. 823 (1986) (emphasis added), (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S. Ct. 80, 83, 34 L. Ed. 2d 267 (quoting *Tumey*, 273 U.S. at 532, 47 S. Ct. at 444)).

Additionally, Judge Bagneris was required by law to recuse himself or refer the motion to another judge after being presented with valid grounds for his recusal. The grounds presented for his recusal were neither frivolous, nor invalid on their face. Moreover, the grounds demonstrated an actual bias of Judge Bagneris, which require his recusal.

For these reasons, applicant, The Board of Commissioners of the Orleans Levee District, respectfully requests that this Honorable Court exercise its supervisory jurisdiction by granting this writ application, and REVERSE the trial court's May 23, 2008 Judgment denying applicant's Motion to Recuse Judge Michael G. Bagneris from hearing the Motion to Recuse Judge Kern A. Reese, declare that trial court's actions a nullity, and re-allot the motion to be heard by a judge ad hoc.

Respectfully submitted,

/s/ Kyle P. Kirsch
Thomas P. Anzelmo, T.A. (#2533)
Mark E. Hanna (#19336)
Kyle P. Kirsch (#26363)
Andre J. Lagarde (#28649)
McCRANIE, SISTRUNK,
ANZELMO, HARDY,
MAXWELL & McDANIEL
3445 N. Causeway Boulevard,
Ste. 800
Metairie, LA 70002
TELEPHONE: (504) 831-0946
FACSIMILE: (504) 831-2492

and

Ben L. Mayeaux #19042
James L. Pate #10333
One Petroleum Center, Suite 200
1001 West Pinhook Road
Lafayette, Louisiana 70503
TELEPHONE: (337) 237-7000
FACSIMILE: (337) 233-9450

AFFIDAVIT VERIFYING ALLEGATIONS AND SERVICE
STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, a Notary Public in and for the said Parish, State of Louisiana, personally came and appeared:

KYLE P. KIRSCH

who, being by me first duly sworn did depose and say:

That he is attorney for in this case; that he has read the above and foregoing Application for Supervisory Writs; that all of the allegations contained therein are true and correct to the best of his knowledge and that copies of this Application for Supervisory Writs were duly served on the following:

Hon. Michael Bagneris
Civil District Court
Parish of Orleans
421 Loyola Avenue, Rm. 304
New Orleans, La. 70112

Darleen M. Jacobs, Esq.
Al A. Sarrat, Esq.
Jacobs & Sarrat
823 St. Louis Street
New Orleans, La. 70112
Attorneys for Plaintiffs

Timothy W. Hassinger, Esq.
Galloway, Johnson,
Thompkins, Burr & Smith
701 Poydras Street,
Suite 4040
New Orleans, La. 70139
Attorneys for the
State of Louisiana/
Dept. of Transportation
& Development

Hon. Kern A. Reese
Judge, Division "L"
Civil District Court
for the Parish of Orleans
421 Loyola Avenue
New Orleans, La. 70112

Charles M. Lanier, Esq.
Christovich & Kearney
601 Poydras Street,
Suite 2300
New Orleans, La. 70130
Attorneys for Sewerage
and Water Board of
New Orleans

The Hon. Danielle Schott
Clerk of Court
Louisiana Fourth
Circuit Copurt
of Appeal
400 Royal Street
New Orleans, LA
70130-2199

by electronic transmission and by depositing a copy of same in the United States mail, postage prepaid and properly addressed.

/s/ Kyle P. Kirsch
KYLE P. KIRSCH

SWORN TO AND SUBSCRIBED BEFORE ME, Notary, this 27th day of August, 2008.

/s/ Jason B. Thrower
NOTARY PUBLIC
No. 84193
Identification Number

Jason B. Thrower
Notary Public #84193
State of Louisiana
My commission is for life.
La. Bar No. 30761

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

NO: 05-11660 DIVISION: L-6

ROBERT HARVEY, DARLEEN JACOBS LEVY, AND SUSAN AND WILLIAM LAURENDINE

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS

FILED: 9/24/05 2:35 p.m. /s/ Dale N. Atkins
$2500.00 Check #519 DEPUTY CLERK

CLAIM FOR DAMAGES
CLASS ACTION
CERTIFICATION REQUESTED

To the Honorable the Judges of the Civil District Court for the Parish of Orleans, State of Louisiana:

The joint Petition of Robert Harvey and Darleen Jacobs Levy, full age residents of the the Parish of Orleans, State of Louisiana and Susan and William Laurendine, full age residents of the Parish of Jefferson, State of Louisiana, respectfully represent:

1.

Defendant, the Board of Commissioners for the Orleans Levee District for the Parish of Orleans is a municipal agency organized and existing in this Parish and State and at all pertinent times hereto,

was responsible for providing flood protection to the Parish of Orleans, State of Louisiana.

2.

That said defendant is justly and truly liable unto your petitioners for an amount that is reasonable under the circumstances, for all costs of these proceedings and for the following, to wit:

3.

On or about August 29, 2005, hurricane winds in excess of 115 miles per hour struck the Metropolitan New Orleans area, causing wind damages to homes and structures.

4.

After the wind subsided, a storm surge created a 500 foot breach in the 17th Street levee and the flood walls collapsed after water flowed over the 17th Street levee and the London Avenue Canal levee.

5.

Once the support flood walls were eroded, they broke, sending water pouring into the Lakeview area and flooding downtown New Orleans.

6.

Petitioners allege that the defendant, the Board of Commissioners for the Orleans Levee District, Parish of Orleans, was negligent in the following respects:

a. Designing and installing concrete flood walls which were below standard and potentially unstable in a flood;

b. Failing to test the flood walls for their ability to withstand cascades of lake water that may push over levees during a hurricane;

c. Failing to interlock the flood walls and/or place a top railing or similar system to bind the walls together.

7.

Because of the aforementioned incident and as a direct and proximate cause thereof, your petitioners sustained the following injuries and damages:

ROBERT HAVEY: Flood damage to his residence at xxxxx xxxxx xxxxx, xxxxx, and loss of business at 2609 Canal Street, New Orleans, LA.

DARLEEN JACOBS LEVY: Flood damage to her residence at xxxxx xxxxx xxxxx, xxxxx; flood damage to numerous rental houses owned by her in the New Orleans Area and loss of business at 823 St. Louis Street, New Orleans, LA.

SUSAN AND WILLIAM LAURENDINE: Loss of business and damage to contents of Gas Station and Convenience store located at 5151 Canal Blvd., New Orleans, LA.

8.

Petitioners aver that the number of business and property owners affected by the negligence of the defendant are too numerous to mention and that this lawsuit should be certified as a class action for all residents, business owners, and occupants of the affected areas in the New Orleans area.

9.

Petitioners aver amicable demand upon defendant to no avail.

Wherefore, petitioners pray that a copy of this petition be served upon defendant herein; that they be duly cited to appear and answer same and that after all legal delays and due proceedings had, there be judgment herein in favor of plaintiffs Robert Harvey, Darleen Jacobs Levy and Susan and William Laurendine and against defendant the Board of Commissioners for the Orleans Levee District, Parish of Orleans, for an amount that is reasonable under the circumstances, for class action certification, for legal interest thereon from date of judicial demand until paid, for all costs of these proceedings, for class

action certification, and for all general and equitable relief.

/s/ Darleen Jacobs
DARLEEN M. JACOBS, ESQ.
(7208)
ROBERT HARVEY, ESQ.
823 St. Louis Street
New Orleans, LA 70112
(504) 522-3287

PLEASE SERVE DEFENDANT
AS FOLLOWS:

Board of Commissioners
Orleans Levee District,
Parish of Orleans
Through their President
James Huey
Orleans Levee District for the
Parish of Orleans
New Orleans Lakefront Airport
2nd Floor
New Orleans, LA

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO.: 05-11660 DIV. "L" DOCKET:

ROBERT HARVEY, DARLEEN JACOBS LEVY, AND SUSAN AND WILLIAM LAURENDINE

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS

FILED: _____ DEPUTY CLERK: _____

FIRST SUPPLEMENTAL AND AMENDING PETITION

(Filed June 7, 2006)

NOW INTO COURT, through undersigned counsel come plaintiffs, ROBERT HARVEY, DARLEEN JACOBS LEVY, AND SUSAN AND WILLIAM LAURENDINE who move this Honorable Court to allow them to supplement and amend their original petition filed herein in the follow respects:

1.

By amending the caption of this lawsuit to read as follows:

SUSAN AND WILLIAM LAURENDINE,
AL LEBOUEF, ALINE HODGES,
PIERRE ASCANI, THERESA HARVEY,

THE HONORABLE DALE ATKINS
AND ANITA L. SARRAT

VERSUS

THE BOARD OF COMMISSIONERS FOR
THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS

2.

By supplementing and amending the preamble of this lawsuit to read as follows:

The joint petition of AL BEBOUEF, ALINE HODGES, PIERRE ASCANI, THERESA HARVEY AND THE HONORABLE DALE ATKINS full age residents of the Parish of Orleans and ANITA L. SARRAT and SUSAN AND WILLIAM LAURENDINE full age residents of the Parish of Jefferson, State of Louisiana with respect represent.

3.

By supplementing and amending Paragraph No. 6 to read as follows:

6.

Petitioners allege that the defendant, THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS were negligent in the following respects:

a) Designing and installing concrete flood walls which were below standard and potentially unstable in a flood;

b) Failing to test the flood walls for their ability to withstand cascades of lake water that may push over the levees during a hurricane;

c) Failing to interlock the flood walls and/or place a top railing or similar system to bind the walls together;

d) Failing to inspect and maintain the levees after their completion;

e) Failing to insure that the proper soil was used in the construction of the levee.

4.

By supplementing and amending Paragraph No. 7 to read as follows:

7.

Because of the aforementioned incident and as direct and proximate cause thereof your petitioners sustained the following injuries and damages:

a) Flood damage to their residences;

b) Evacuation expenses;

c) Emotional stress and strain;

d) Psychological damages;

e) Loss of furniture, personal belongings memorabilia and property damage;

f) Loss of income;

g) Loss of business; and

h) Loss of society;

i) Medical expenses;

j) Fear and fright.

5.

By supplementing and amending the original petition to add Paragraph 8a to read as follows:

8a.

The proposed class representatives and named plaintiffs seek to represent the following class; all residents domiciliary and property owners of the Parishes of Orleans and Jefferson in the State of Louisiana who were affected by the flooding caused by the failure of the hurricane protection levees and flood wall in New Orleans, Louisiana and

a) who has sustained any injury or damage thereby or;

b) who may suffer such injury or damage in the future as a result thereof or;

c) who has sustained a justifiable fear of sustaining such injury or damage in the future as a result thereof.

6.

By adding Paragraph 8b to read as follows:

8b.

The questions of law and fact arising out of the claims made by the proposed class are common and typical but are not limited to establishing facts to resolve the following questions of law:

a) Whether the flood levees and flood walls in question were defective;

b) Whether or not the defective levees and/or flood walls caused or contributed to flooding which occurred in Orleans and Jefferson Parish;

c) Whether the actions for the Board of Commissioners for the Orleans Levee District, Parish of Orleans were negligent in the following respects:

    a) Designing and installing concrete flood walls which were below standard and potentially unstable in a flood;

    b) Failing to test the flood walls for their ability to withstand cascades of lake water that may push over the levees during a hurricane;

    c) Failing to interlock the flood walls and/or place a top railing or similar system to bind the walls together;

    d) Failing to inspect and maintain the levees after their completion;

e) Whether the Board of Commissioners for the Orleans Levee District, Parish of Orleans failed to properly inspect and/or maintain the levees and whether or not their actions and/or inactions were a proximate cause of plaintiffs' damages;

f) Whether the Board of Commissioners for the Orleans Levee District, Parish of Orleans are strictly liable to those damaged by the floods;

g) Whether or not the Board failed to insure that the proper soil was used in construction of the levees,

7.

By supplementing and amending the original petition to add Paragraph 8c to read as follows:

8c.

The plaintiffs claims are typical of the claims of the proposed class.

8.

By supplementing and amending the original petition to add Paragraph 8d of the original petition to read as follows:

8d.

Plaintiffs will fairly and adequately represent and protect the interest of all members of the described class, Plaintiffs have retained attorneys highly experienced in the prosecution of class action, including complex litigation and mass tort action cases to represent class members.

9.

By supplementing and amending the original petition to add Paragraph 8e to read as follows:

8e.

The common questions of law and fact as shown above predominate over individual questions of causation or individual damages; concentrating this litigation in one forum will aid with judicial economy and efficiency and promote parity among the claims of individual class members as well as judicial consistency.

10.

By adding Paragraph 10 to read as follows:

10.

A class is superior to other available weapons for the fair and efficient adjudication of this litigation; this individual joinder of all members of each class is practical; even if any class member could afford

individual litigation it would be unduly burdensome on the court in which an individual litigation would proceed. Individual litigation magnifies the delay and expense to all parties in the court system of resolving the controversy existing herein.

11.

By adding Paragraph No. 11 to read as follows:

11.

Petitioners desire and are entitled to trial by jury on all issues herein.

WHEREFORE, petitioners pray that a copy of this petition be served upon defendant herein, that they be duly cited to appear and answer same and that after all legal delays and due proceedings had, there be judgment herein in favor of plaintiffs, AL LEBOUEF, ALINE HODGES, PIERRE ASCANI, THERESA HARVEY, THE HONORABLE DALE ATKINS, ANITA L. SARRAT AND SUSAN AND WILLIAM LAURENDINE and against defendant THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS, for an amount that is reasonable under the circumstances, for class action certification, for legal interest thereon from date of judicial demand until

paid, for all costs of these proceedings, for trial by jury, and for all general and equitable relief.

Respectfully submitted:

/s/ Darleen Jacobs
DARLEEN M. JACOBS, ESQ.
(#7208), T.A.
ROBERT G. HARVEY, ESQ.
CHARLES J. IMBORNONE, ESQ.
KENNETH CHARBONNET, ESQ.
LLOYD FRISCHHERTZ, ESQ.
823 St. Louis St.
New Orleans, LA 70112
(504) 522-3287
Attorneys for Plaintiffs

PLEASE SERVE DEFENDANT AS FOLLOWS:

BOARD OF COMMISSIONERS
ORLEANS PARISH LEVEE DISTRICT,
PARISH OF ORLEANS
Through its attorney of record
Thomas P. Anzelmo, Esq.
3445 N. Causeway Blvd., Ste. 800
Metairie, LA 70002

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO.: 05-11660 DIV. "L" DOCKET:

SUSAN AND WILLIAM LAURENDINE, AL LEBOUEF, ALINE HODGES, PIERRE ASCANI, THERESA HARVEY, THE HONORABLE DALE ATKINS AND ANITA L. SARRAT

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS

FILED: _____ DEPUTY CLERK: _____

SECOND SUPPLEMENTAL AND AMENDING PETITION

(Filed Jul. 10, 2006)

NOW INTO COURT, through undersigned counsel come plaintiffs, SUSAN AND WILLIAM LAURENDINE, AL LEBOUEF, ALINE HODGES, PIERRE ASCANI, THERESA HARVEY, THE HONORABLE DALE ATKINS AND ANITA L. SARRAT who move this Honorable Court to allow them to supplement and amend their original petition and First Supplemental and Amending Petitions filed herein in the follow respects:

1.

By supplementing and amending the caption of this lawsuit to read as follows:

SUSAN AND WILLIAM LAURENDINE,
AL LEBOUEF, ALINE HODGES, PIERRE ASCANI,
THERESA HARVEY, THE HONORABLE
DALE ATKINS AND ANITA L. SARRAT

VERSUS

THE BOARD OF COMMISSIONERS FOR
THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS, DEPARTMENT
OF TRANSPORTATION AND DEVELOPMENT,
SEWERAGE AND WATER BOARD AND
THE STATE OF LOUISIANA

2.

By supplementing and amending Paragraph No. 1 to read as follows:

1.

Defendant, the BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS is a political subdivision of the State of Louisiana domiciled in Orleans Parish and, at all pertinent times hereto was responsible for providing flood protection for the Parish of Orleans, State of Louisiana and for the efficient operation and maintenance of all of the levee structures and facilities in addition to continuous inspection and maintenance

of all of the levees and floodwalls; defendant, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, is a state agency organized within this state and, at all pertinent times hereto was responsible for maintaining and inspecting the levees in the Parishes of Orleans and Jefferson, State of Louisiana, more particularly the 17th Street Canal levee and the London Avenue Canal levee; defendant, SEWERAGE AND WATER BOARD, is a municipal agency existing within the Parish of Orleans, State of Louisiana and, at all pertinent times hereto was responsible for inspection and maintenance procedures performed on Orleans Parish levees as well as the dredging of their canals; defendant, THE STATE OF LOUISIANA is a sovereign state and, at all pertinent times hereto was responsible for financing, overseeing, maintaining and supervising activities of the Board of Commissioners for the Orleans Levee District and the DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT as well as insuring that the citizens of Orleans and Jefferson Parishes were safe from levee brakes.

3.

By supplementing and amending the original and first supplemental and amending petitions to add 5a, 5b, 5c, 5d, 5e, 5f and 5g to read as follows:

5a.

Upon information and belief, before the levees and floodwaters were constructed, soil borings were

taken to assess the strength of the soil and its ability to withstand the force of flood waters pushing against it and still remain in place.

5b.

Upon information and belief, a soil study was performed in 1981 which took soil borings along the location of the 17th Street Canal Levee,

5c.

The soil borings revealed alternating layers of soft clay and soft, black humus or peat, a soft, spongy soil comprised of decaying trees and other organic material, from fifteen to twenty-one feet below sea level.

5d.

The layer of humus or peat substantially reduced the strength of the soil, particularly its strength in resisting lateral pressure and its ability to support the 17th Street Canal Levee and London Canal when they were under pressure from floodwater.

Despite the presence of a layer of soft, spongy material at a depth of fifteen (15) to twenty one (21) feet below sea level, the flood walls of the 17th Street Canal Levee and London Canal were constructed with steel sheet piling driven to a depth that was seventeen (17) feet below sea level. At such depths, the protective sheet pilings ended above or right in the middle of layers of weak soil.

5f.

Additionally, the soil adjacent to the 17th Street Canal and London Canal Levees subsided significantly after construction of the levee and floodwall, thereby significantly reduced the amount of support that the land behind the levee provided against the pressure of floodwaters.

5g.

Upon information and belief, the soil studies performed in connection with construction of the 17th Street Canal and London Canal Levees were not conducted with a reasonable degree of care and diligence and failed to account for the possible weakening of the soil in connection with the effect of subsidence of land on the protected side of the levee, soft soils at the base of the levee, and the soil that was weakened as flood waters pushed through subterranean levels under the levee and floodwall. Alternatively, the soil studies failed to warn against the dangers that should, in the exercise of reasonable care, have been anticipated in connection when the pressure of flood water was applied to soil beneath the 17th Street Canal Levee.

4.

By supplementing and amending Paragraph 6 to read as follows:

6.

Petitioners allege that the defendants, THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, SEWERAGE AND WATER BOARD AND THE STATE OF LOUISIANA were jointly, severally and in solido negligent and that such negligence caused and/or contributed to the levee failures in the following respects:

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS AND THE STATE OF LOUISIANA

a) Failing to inspect, maintain, monitor, protect and/or repair the levees and floodwalls along the 17th Street Canal and London Avenue Canal;

b) Failing to check the flood walls for their ability to withstand cascades of lake water that may push over levees during a hurricane;

c) Failing to interlock the flood walls and/or place the top railing or similar systems to bind the walls together;

d) Using soil to shore the levees which was not sufficient to ensure protection against a flood or natural disaster.

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

a) Allow trees, debris and limbs to remain along side the levee system;

b) Failing to clean the sides of the levee system and institute proper shoring procedures;

c) Other acts of negligence to be shown at the trial of this matter.

SEWERAGE AND WATER BOARD

a) Dredging the waterways and tributaries improperly and to a degree that would produces a tidal surge;

b) Failing to inspect the levees for possible leaks;

c) Failing to institute proper inspection and testing procedures to ensure that the dredging of the levee system was safe for the citizens of New Orleans.

5.

By supplementing and amending Paragraph 8a to read as follows:

8a.

The proposed class representatives and named plaintiffs seek to represent the following class:

All residents, domicilaries, property owners and business owners of the parishes of Orleans and

Jefferson in the State of Louisiana whose persons, properties or businesses were damaged by flooding caused by the failure of the 17th Street Canal and London Avenue Canal hurricane protective levees and floodwalls in New Orleans, Louisiana on or after August 29, 2005, who may suffer such injury or damage in the future as a result thereof or who have sustained a justifiable fear of sustaining such injury or damage in the future as a result thereof.

WHEREFORE, petitioners, reiterating and reavering each and every allegation of their original and First Supplemental and Amending Petitions as though copied at length herein, pray that their original and First Supplemental and Amending Petitions be supplemented and amended in the above particulars and that, after all legal delays and due proceedings had, there be judgment herein favor of plaintiffs, SUSAN AND WILLIAM LAURENDINE, AL LEBOUEF, ALINE HODGES, PIERRE ASCANI, THERESA HARVEY, THE HONORABLE DALE ATKINS AND ANITA L. SARRAT and against defendants, THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, PARISH OF ORLEANS, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, SEWERAGE AND WATER BOARD AND THE STATE OF LOUISIANA, jointly, severally and in solido for an amount that is reasonable under the circumstances, for class action certification, for legal interest thereon from date of judicial demand until paid, for all costs of these proceedings,

for trial by jury and for all general and equitable relief.

Respectfully submitted:

/s/ Darleen Jacobs
DARLEEN M. JACOBS, ESQ.
(#7208), T.A.
ROBERT G. HARVEY, ESQ.
CHARLES J. IMBORNONE, ESQ.
KENNETH CHARBONNET, ESQ.
LLOYD FRISCHHERTZ, ESQ.
823 St. Louis St.
New Orleans, LA 70112
(504) 522-3287
Attorneys for Plaintiffs

PLEASE SERVE DEFENDANT
AS FOLLOWS:

BOARD OF COMMISSIONERS
ORLEANS PARISH LEVEE DISTRICT,
PARISH OF ORLEANS
Through its attorney of record
Thomas P. Anzelmo, Esq.
3445 N. Causeway Blvd., Ste. 800
Metairie, LA 70002

DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT
(Along with the original and First Supplemental and Amending Petition)
1201 Capital Access Road
Baton Rouge, LA 70804

SEWERAGE AND WATER BOARD OF
NEW ORLEANS
(Along with the original and First Supplemental and
Amending Petition)
625 St. Joseph Street
New Orleans, LA 70165

STATE OF LOUISIANA
(Along with the original and First Supplemental and
Amending Petition)
Through the Honorable Governor Kathleen Blanco
Baton Rouge, LA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DOROTHY REESE	**CIVIL ACTION NO.** _____
vs.	**SECTION** 07-4999
UNITED STATES OF AMERICA BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT, BOARD OF COMMISSIONERS OF THE EAST JEFFERSON LEVEE DISTRICT, SEWERAGE AND WATER BOARD OF NEW ORLEANS, ST. PAUL FIRE & MARINE INSURANCE COMPANY, AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH	**JUDGE** _____ **MAGISTRATE** SECT. K MAG. 2

****

COMPLAINT FOR DAMAGES

(Filed Aug. 29, 2007)

Dorothy Reese ("Plaintiff") respectfully submits her Complaint for Damages as follows:

INTRODUCTION

1.

This Complaint arises out of catastrophic failures of and deficiencies in the hurricane protection system surrounding the Parish of Orleans, State of Louisiana, which occurred on and after August 29, 2005. These failures and deficiencies caused and substantially contributed to the inundation of approximately 80% of the New Orleans metropolitan area, causing extensive harm and loss of life, and destroying or rendering uninhabitable approximately 160,000 residences and buildings.

2.

Plaintiff owned and/or resided at the property located at xxxxx xxxxx xxxxx on or about August 29, 2005 when the New Orleans levee system failed, particularly the 17th Street, London Avenue, and Orleans Avenue Canals. The failure of the New Orleans levee system, the horrific result of man-made acts, caused extensive damage to Plaintiff's residence and contents among other damages discussed *infra*.

PARTIES

3.

Plaintiff is a citizen of the state of Louisiana and domiciled in the state of Louisiana. On February 27, 2007, Plaintiff presented a claim to the United States Army Corps of Engineers (the "Corps") for damages

arising out of the failure of the New Orleans levee and floodwall system pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.* The Corps acknowledged receipt of Plaintiff's claim and assigned the following claim numbers – 07N15T0024000, 07N15T0256397, and 07N15T0023423.[1] Plaintiff also presented a claim to the Corps for damages arising out of the failure of the New Orleans levee and floodwall system pursuant to the Suits in Admiralty Act, 46 U.S.C. §30901-18, the Public Vessels Act, 46 U.S.C. §46-31101-13, the Admiralty Extension Act, 46 U.S.C. §30101, and the general maritime law of the United States. The Corps acknowledged receipt of Plaintiff's second claim and assigned a claim number of 07N15T0257197.[2] Six months have elapsed since the presentation of Plaintiff's claims, and the United States Army Corps of Engineers has failed to act by either accepting or rejecting Plaintiff's claims. Thus, such failure must presumably be considered a denial of Plaintiff's claims.

4.

Defendant United States of America is a sovereign government amendable to suit for civil liability in accordance with the federal laws and regulations as set forth herein. Defendant United States Army

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[1] *See* Exhibit "A." The government provided different claim numbers for the same form.

[2] *See* Exhibit "B."

Corps of Engineers is a division of the United States Government under the direct jurisdiction of the Department of the Army (collectively the "Corps").

5.

Defendant Board of Commissioners for the Orleans Levee District ("OLD") is a local government entity created by Louisiana Revised Statute §38:291, amendable to suit, and domiciled in the Parish of Orleans, State of Louisiana.

6.

Defendant Sewerage and Water Board of New Orleans ("SWB") is a political subdivision of the State of Louisiana created by Louisiana Revised Statutes §33:4071 *et seq.*, amendable to suit, and domiciled in the Parish of Orleans, State of Louisiana.

7.

Defendant Board of Commissioners of the East Jefferson Levee District ("EJLD") is a political subdivision of the State of Louisiana created by Louisiana Revised Statute §38:291, amenable to suit, and domiciled in the Parish of Jefferson, State of Louisiana.

8.

Defendant St. Paul Fire and Marine Insurance company ("St. Paul") is a foreign insurance company authorized to do and doing business within the State of Louisiana. At all times relevant hereto, St. Paul had in full force and effect a policy of liability insurance, under the terms, provisions, and conditions of which is assumed liability for the acts and/or negligence of its insured, the Board of Commissioners of the Orleans Levee District, and is therefore liable to Plaintiff, and Plaintiff asserts its claims under the Louisiana Direct Action Statute, LSA-R.S. 22:655.

9.

Defendant National Union Fire Insurance Company of Pittsburgh ("National Union") is a foreign insurance company authorized to do and doing business within the State of Louisiana. At all times relevant hereto, National Union had in full force and effect a policy of liability insurance, under the terms, provisions, and conditions of which is assumed liability for the acts and/or negligence of its insured, the Board of Commissioners of the East Jefferson Levee District, and is therefore liable to Plaintiff, and Plaintiff asserts its claims under the Louisiana Direct Action Statute, LSA-R.S. 22:655.

10.

Plaintiff avers that this matter is timely to all Defendants and is within the applicable statute of

limitations as there is a related class action proceeding pending in this Court in matter captioned *In re Katrina Canal Breaches Litigation*, No. 05-4182(K)(2) (Ref: LEVEE). As recognized by the United States Supreme Court, the "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would not have been parties had the suit been permitted to continue as a class action." *Crown, Cork, & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54 (1983).

JURISDICTION

11.

This Court maintains subject matter jurisdiction over this action pursuant to 28 U.S.C. §1346(b) (Defendant United States) and 28 U.S.C. §2671, *et seq.* (Federal Tort Claims Act), violations of laws of the United States, including, but not limited to, 33 U.S.C. § 1251, *et seq.* (Federal Water Pollution Control Act), 16 U.S.C. § 1451 *et seq.* (Coastal Zone Management Act), and, 33 U.S.C. §403 *et seq.* (River & Harbors Act), and, alternatively, for violation of the Constitution and Laws of the State of Louisiana as well as the Constitution and Laws of the United States.

12.

Plaintiff has presented to the Corps the written, administrative claims required by the provisions of 28 U.S.C. §2671, *et seq.* (Federal Tort Claims Act) and in

all respects have complied with the provisions of this statute. As discussed *supra*, a period of at least six months has elapsed since the filing of Plaintiff's written, administrative claims.

13.

Alternatively, Plaintiff avers jurisdiction is proper pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). Additionally, and in the alternative, jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1367, in as much as this Court has supplemental jurisdiction over all state law claims herein arising out of the same case or controversy.

14.

Alternatively, Plaintiff pleads admiralty and maritime jurisdiction and causes of action under the Admiralty Extension Act, 46 U.S.C. §30101, the Suits in Admiralty Act, 46 U.S.C. § 30901-18, and/or the Public Vessels Act, 46 U.S.C. § 31101-13. Upon information and belief, one or more of the vessels owned, operated, and/or controlled by the United States government in the construction of the levees, floodwalls, and canals at issue in this Complaint caused or contributed to Plaintiff's damages. Plaintiff has presented to the Corps the written, administrative claims required by the provisions of 46 U.S.C. §30101 (Admiralty Extension Act). A period of at least six months has elapsed since the filing of Plaintiff's written, administrative claims.

VENUE

15.

Venue is proper in this district pursuant to 28 U.S.C. § 1391 because the Defendants' negligent and wrongful actions occurred in the Eastern District of Louisiana, a substantial part of the events and omissions giving rise to this action occurred in the Eastern District of Louisiana, and the property that is the subject of this action is situated within the Eastern District of Louisiana.

WAIVER OF SOVEREIGN IMMUNITY

16.

The United States of America and the Corps waived their sovereign immunity in connection with the claims asserted in this suit by the enactment of the Federal Tort Claims Act, 28 U.S.C. § 2671 ("FTCA"). While Plaintiff believes that all of his claims against the Corps are derived from the FTCA applying the tort and other laws of the State of Louisiana, out of an abundance of caution, Plaintiff alternatively pleads admirably and maritime jurisdiction and causes of action under the Admiralty Extension Act, 46 U.S.C. §30101, the Suits in Admiralty Act, 46 U.S.C. § 30901-18, the Public Vessels Act, 46 U.S.C. § 31101-13, the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*, and the River & Harbors Act, 33 U.S.C. §403 *et seq.*

17.

Any immunity sought by the Corps pursuant to 33 U.S.C. §702(c) is not available to the extent the provisions of this Act do not apply, have not been complied with, and/or the liability of the corps is not predicated on flood control activity. The activities undertaken by the Corps in connection with this litigation are not activities forming part of a federal flood control project, nor are the Corps's activities in connection with an authorized federal control project. Accordingly, the provision of the Flood Control Act of 1928, 33 U.S.C. §702(c), is not applicable as a basis for governmental immunity.

FACTUAL BACKGROUND REGARDING THE 17th STREET CANAL

A. The History of the 17th Street Canal

18.

The canal known today as the "17th Street Canal" forms a significant portion of the boundary between Orleans Parish, Louisiana and Jefferson Parish, Louisiana. Historically, the 17th Street Canal has also been known as the "Metairie Outlet Canal," the "Metairie Outfall Canal," the "Metairie Relief Canal," and the "Upperline Canal."

19.

The 17th Street Canal originated at the start of the 1850's as a canal dug through swampy ground to

provide a right-of-way. It was located where the Jefferson and Lake Ponchatrain Railway was built, a railway connecting the town once called Carrollton with a shipping port on Lake Ponchatrain in the area today know as Bucktown.

20.

In 1858, a secondary canal was built, connecting the original canal to the river side of the Metairie Ridge. This spur canal was situated alongside a projected street numbered "17th Street," and thus, the canal became known as the "17th Street Canal." The term "17th Street Canal" eventually referred to the original, larger canal to which this spur canal connected.

21.

The community of Bucktown, where the northern end of the 17th Street Canal enters Lake Ponchatrain, was founded more than one hundred years ago as a group of fishing and hunting camps along the canal and Lake Ponchatrain. The earliest structures were wooden huts raised on stilts, and the canal served as a harbor and a mode of transportation for fishing boats.

22.

More substantial development in this area occurred during the mid-19th century with the construction of a commercial wharf and a resort called "Lakeport." Steamboats docked at the entrance to the New Basin Canal (now Ponchatrain Boulevard) and at the terminus of the Jefferson and Lake Ponchatrain Railway (presently Bucktown).

23.

The SWB took over the operation of the 17th Street Canal at the end of the 19th century. The canal was re-dredged in 1897, and again in 1929. In 1913, the SWB completed the construction of Pumping Station No. 6, which drained a large portion of New Orleans through the canal. Until recent years, the 17th Street Canal was home to a fleet of approximately one hundred shrimp boats. The fleet previously had a lease agreement with the defendant SWB.

24.

The 17th Street Canal historically is, and at all times pertinent herein has been, a navigable waterway in New Orleans that flows into Lake Ponchatrain.

B. The 17th Street Canal Dredging Project

25.

On July 15, 1974, the SWB initiated a project to improve drainage through the 17th Street Canal. Initially, this project called for the dredging of 2.4 miles of the canal from Pump Station No. 6 to Lake Ponchatrain to remove sediment from the canal bottom and to reshape the canal cross-section for the improvement of flow and the pump capacity of Pump Station No. 6. The removal of approximately 85,000 cubic yards of bottom sediment was anticipated.

26.

Because dredging projects in navigable waters of the United States require a Department of the Army permit pursuant to the River & Harbors Act, the SWB filed an application with the Corps for a "Permit to Discharge or Work in Navigable Waters and their Tributaries." The Operations Division of the Corps is responsible for the issuance of permits to dredge navigable waterways. Hence, the issuance of the dredging permit for the 17th Street Canal was the province of the Corps' Operating Division, and no, for example, the Corps' Engineering Division, which is responsible for flood control.

27.

The permit approval process required the SWB to also obtain approval from, among others, the Louisiana

Department of Public Works. In August of 1974, the Louisiana Department of Public Works responded to the 17th Street Canal dredge permit application by stating it could not complete a review of the application because the applicant (SWB) ***had no soil data substantiating the stability or integrity of the canal's levees***.

28.

On May 23, 1977, the Corps returned the dredging application with no action because the SWB had failed to furnish information requested by, among others, the Louisiana Department of Public Works.

29.

In 1978, the SWB retained a civil engineering firm, Modjeski and Masters, Inc. ("M&M") to provide a plan for the design and implementation of the dredging project. On August 23, 1979, M&M submitted a second dredging permit application on behalf of the SWB. On December 29, 1980, M&M re-submitted the dredging permit application after environmental concerns were raised relative to the disposal of the dredged material in Lake Ponchatrain and on the banks of the canal.

30.

On January 28, 1981, M&M, in response to inquiries about the impact of the dredging on existing

levees, issued the Corps with a memorandum addressing the stability of the existing levees and sheet pile wall along the canal. M&M's memorandum indicated that at three of the six test locations, the factors of safety ***fell below the required values set by the Corps***. The handwritten report specifically stated that ***"two locations yielded low factors of safety due to . . . the existence of very soft clays."***

31.

On March 5, 1981, the Corps issued an internal memorandum addressing the soil stability analyses provided by M&M which acknowledged that, in connection with the proposed dredging of the canal, safety factors were substantially below the minimum 1.30 factor of safety, requiring that the project be redesigned. The specific location of the canal's levee system to which this internal memorandum referred coincides with the area where the 17th Street Canal breached during Hurricane Katrina.

32.

On March 31, 1981, the Corps held a public hearing regarding the 17th Street Canal dredging permit application. Discussions took place regarding whether raising the existing sheet pile wall along the canal, as opposed to dredging to deepen the canal, would provide a greater cross-section and greater pump capacity. The consulting engineer representing. M&M voiced his concerns about widening the canals

and stated that ***not only were the levees already in violation of the Corps's engineering standards for levee stability, but that dredging attempts to remove material adjacent to the levees would only worsen the stability problem.***

33.

On April 20, 1981, in response to concerns that the proposed dredging of the 17th Street Canal would negatively impact the existing canal levee, M&M announced a preliminary plan to install sheet pile walls with concrete caps prior to any dredging or excavation. The sheet pile walls were to be of a sufficient height to meet all applicable flood protection criteria. An internal Corps memorandum dated June 16, 1981, based on a review of this proposal by M&M, acknowledged that a number of levee and flood wall stability problems were likely to occur should the SWB dredging be granted.

34.

An internal memorandum from the Corps' Engineering Division to the Corps' Operations Division, dated February 12, 1982, noted the existence of a stability problem in the 17th Street Canal at a location where excavation would directly tap the sands underlying the levee. The memorandum suggested that a stability analysis be performed for the land side of the canal, incorporating effects of seepage to determine what corrective action might be needed.

Sands underlay the entire 2.4 miles of the 17th Street Canal, from Pumping Station No. 6 to Lake Pontchatrain, and the stability problem recognized in this memorandum, therefore, cannot be confined to any one section of the canal.

35.

On August 23, 1982, Eustis Engineering Company ("Eustis") provided M&M with a more comprehensive subsoil investigation report, which in pertinent part recognized that measures "should be taken" because of "the possibility of a blow-out during extreme high water in the canal." The report also identified "preventive measures," including, "the installation of a seepage cutoff through the levee crown, installation of pressure relief wells near the land side toe of the levee, and sealing the canal bottom." Eustis's recommendations were restricted to only specific areas of the canal, however, and not to the entire canal levee system. On November 30, 1982, M&M furnished the Corps with copies of Eustis's soil investigation report.

36.

On February 22, 1983, the Chief of the Corps' Engineering Division advised the SWB that the Corps believed "the installation of relief wells would be an appropriate way to provide the necessary assurance against uplift" of the 17th Street Canal's sheet piles.

37.

On May 9, 1983, M&M submitted on behalf of the SWB a new permit application for the 17th Street Drainage Canal Improvement Project. This application was to supersede the application for Phase I, submitted on December 29, 1980, and Phase II, submitted on April 20, 1981, by combining the two phases into one project with the project limits being Pump Station No. 6 on the south and 370.0 feet north of the Bucktown Pedestrian Bridge. The project now envisioned the ***removal of 470,000 cubic yards*** of canal bottom whereas the original plan called for the removal of 85,000 cubic yards.

38.

On July 27, 1983, Eustis submitted a revised soil stability report, which both confirmed the potential for a blow-out at the land side toe of the levee and extended the area of concern to be pumping station. In this report, Eustis recommended dredging a test section in the 17th Street Canal to study the hydrostatic uplift pressure.

39.

From November 29 to December 16, 1983, a test section was dug just south of Interstate 10. Six piezometers were installed on the Jefferson Parish side of the 17th Street Canal to closely monitor changes in the hydrostatic pressures before, during, and after completion of the excavation. Eustis submitted a

report on the test dredging to the Corps on January 17, 1984. The report concluded that the piezometers monitored no relevant changes upon the dredging of the test section. The report further concluded that the possibility of a blow-out during high water conditions in the canal was probably slight. However, the piezometer study of the test section did not account for the pre-existing, permeable soils of the canal, and therefore, the study's conclusions as to stability and permeability were unreliable.

40.

On June 13, 1984, the Corps issued a permit to "dredge to enlarge and maintain an area and install and maintain flood walls and mooring structures, in the 17th Street Canal (Metairie Relief Canal) from Pumping Station No. 6 to a point about 400 feet north of the Bucktown Pedestrian Bridge . . . " The "Statement of Findings" issued with the permit stated that factors considered in issuing the permit included, *inter alia*, "navigation," both present and prospective flood heights and flood plain use, and "other public interests."

41.

The dredging project was ultimately divided into the following phases: Phase I from Pump Station No. 6 to Interstate 10; Phase II-A from Interstate 10 to Hammond Highway – Orleans side; Phase II-B from Interstate 10 to Hammond Highway – Jefferson side;

and Phase III from Hammond Highway to Lake Ponchatrain.

42.

Phase I was completed June 1, 1984. However, because the SWB and the OLD could not reach an agreement with EJLD regarding Phase II of the Project, an extension of the permit work was granted by the Corps on February 20, 1987.

43.

On April 24, 1987, the Corps created a drawing with a sheet pile design that indicated that the sheet pile tips were located 16 feet lower than the bottom of the 17th Street Canal. Even as the Operations Division of the Corps was addressing the SWB permit, therefore, the defendant's Engineering Division was addressing levee wall design that might incorporate the sheet piles that were permitted under the dredging project.

44.

On August 11, 1988, the SWB issued the work order for Phase III of the dredging project, and the job was completed on December 6, 1989. The work order for Phase II-A of the dredging project, which included the installation of the sheet piles on the Orleans Parish side of the canal, was issued on July 4, 1990,

and the job was completed on January 10, 1992 by Boh Bros. Construction Co., Inc.

45.

The dredging activity conducted in the 17th Street Canal pursuant to the SWB permit was specified contractually to entail "bucket dredging" from a series of flex-boat barges in the canal. The barges constituted vessels in navigation for the time period during which the dredging occurred.

C. The Construction of 17th Street Canal Concrete Monoliths

46.

Without any Congressional authorization or reauthorization, the Corps unilaterally deviated from a Congressionally-authorized "Barrier Plan," which called for the installation of floodgates at the mouth of the 17th Street Canal (at Lake Ponchatrain). Defendants SWB and CLD objected to the installation of these floodgates. The Corps thereafter proposed a "Parallel Protection Plan" for the 17th Street Canal, which called for increasing the height of the flood barriers on the east and west banks of the canal. This was part of an overall "High Level Plan," which replaced the "Barrier Plan" even though this change was not authorized by Congress.

47.

In connection with the "High Level Plan," the Corps considered three options – levees, T-walls, and I-walls. The Corps rejected the use of levees and T-walls because such construction was purportedly not economically justified. Instead, under the auspices of the Corps acting in connection with the OLD, the 17th Street Canal's flood walls were constructed with an "I-wall" design which called for the construction of a concrete monolith on top of the existing sheet pile (in place from the dredging project).

48.

The U.S. Army Corps of Engineers Manual on Engineering, Design and Construction of Levees, dated April 30, 2000, states that for stability reasons, flood walls utilizing the "I-wall" design rarely exceed seven (7) feet above ground surface, and that an inverted "T-wall" design is used when walls higher than seven feet are required. ***Nonetheless, the I-walls on the 17th Street Canal were built in concrete sections that rise eleven (11) feet about the ground.***

49.

Further, upon information and belief, Eustis performed a soil analysis in 1981, which entailed borings along the 17th Street Canal's levee. The borings revealed alternating layers of soft clay and black humus or peat – a soft, spongy soil comprised of decaying trees and other organic material – located

fifteen to twenty-one feet below sea level. This layer of humus and peat substantially reduced the strength of the soil, particularly its strength in resisting lateral pressure and its ability to support the levee and flood walls under pressure from flood water.

50.

However, despite Eustis's findings regarding the weak soil, the Corps elected to build the walls of the 17th Street Canal with steel sheet piling driven to a depth that was seventeen (17) feet below sea level – either above or in the middle of the layers of weak soil. To make matters worse, the soil adjacent to the 17th Street Canal levee subsided significantly after construction of the levee and flood wall, greatly reducing the amount of support that the land behind the levee provided against the pressure of flood waters.

51.

Then, in 1993, C.R. Pittman Construction Company, Inc. ("Pittman") was retained for the construction of the concrete monoliths atop the steel sheet pile wall along the 17th Street Canal. Pittman reported to the Corps that it was encountering major problems – specifically, the sheet pile walls and concrete monoliths were beginning to lean towards the canal side as the soil foundation was not of sufficient strength, rigidity and stability. Despite these concerns and problems, however, the Corps allowed the construction

of the I-walls to continue, and Pittman built the concrete monoliths on top of the sheet pile driven into the unstable soil.

52.

Altogether, Defendants either failed to account for the soil and flood wall stability problems associated with the 17th Street Canal or proceeded with the engineering, design, and construction of the 17th Street Canal despite such problems. As the result of Defendants' combined negligence, the 17th Street Canal failed during Hurricane Katrina, flooding the surrounding area and causing extensive damage to Plaintiff's property.

FACTUAL BACKGROUND REGARDING THE LONDON AVENUE CANAL

53.

The London Avenue Canal was constructed in the first half of the 19th century through an area that was mostly swampland and later became part of the City of New Orleans. The canal originally served a dual purpose of commerce and drainage, *i.e.*, it both permitted small boat traffic from Lake Ponchatrain to a section of New Orleans and provided for swamp drainage.

54.

The London Avenue Canal historically is, and at all times pertinent herein has been, a navigable waterway within the meaning of the general maritime law.

55.

The Corps, in coordination with the OLD and SWB, was responsible for the design and construction of the London Avenue Canal's levee system.

56.

A major project to upgrade the flood walls and bridges along the London Avenue Canal began in the early 1980's. The Corps had previously proposed placing a floodgate at the hurricane levees where the London Avenue Canal entered Lake Ponchatrain to provide protection from storm surge. The OLD and SWB, however, objected to this plan and instead favored building and raising the height of the parallel flood walls and levee structures along each side of the canal (the aforementioned "Parallel Protection Plan"). By 1991, the Corps, OLD and SWB had decided to proceed with this latter plan.

57.

The resulting flood walls along the London Avenue Canal were constructed atop earthen levees with an "I-wall" design consisting of steel sheet

pilings driven into the compacted dirt atop the levee with reinforcing steel rods threaded through the top of the piling. Concrete was poured to encapsulate the top of the pilings and form the wall. The wall is composed of individual concrete slab sections (monoliths) that are linked together by rubbery gaskets (water stops) intended to prevent water from flowing between the monoliths and to allow the concrete to expand and contract.

58.

The entirety of the London Avenue Canal is constructed over beach sands of the Pine Island trend. The sands are located approximately 13 to 15 feet below the crowns of the I-wall levees of the canal, but are deeper at the vicinity where the northern breach occurred during Hurricane Katrina (station 113 to 118). The sand is covered with a veneer of peaty swamp deposits.

59.

Two key considerations in constructing an I-wall atop an earthen levee are 1) the composition of the soil into which the sheet piles will be driven and upon which the I-walls will rest and 2) the depth of the sheet piles based on the composition of the soil.

60.

Soil borings of the levee at the site of the London Avenue Canal south breach, which contributed to the catastrophe giving rise to this litigation, showed a layer of sand at a depth of 10 to 15 feet below sea level. Similar to the conditions at the south breach, soil borings of the levee at the site of London Avenue Canal north breach showed a layer of sand at a depth of 12 feet below sea level, as well as a layer of peat – a highly porous material that shrinks when dry and expands when wet, creating highly unstable soil conditions. Despite this layer of unstable sand, the sheet piles supporting the flood wall monoliths of the London Avenue Canal were driven to a depth of 14 feet below sea level. ***Thus, the bottom of the sheet piles fell within a layer of sand.***

61.

As discussed *supra*, the flood walls along the London Avenue Canal are constructed with an "I-wall" design. The U.S. Army Corps of Engineers Manual on Engineering, Design and Construction of Levees dated April 30, 2000 states that, for stability reasons, flood walls utilizing the "I-wall" design rarely exceed seven (7) feet above ground surface and that an inverted "T-wall" design is used when walls higher than seven feet are required. ***Nonetheless, the flood walls at the breach sites of the London***

Avenue Canal, although built with an "I-wall" design, have concrete sections that rise to eleven (11) feet above ground surface.

62.

Altogether, Defendants either failed to account for the soil and flood wall stability problems associated with the London Avenue Canal or proceeded with the engineering, design, and construction of the London Avenue Canal despite such problems. As the result of Defendants' combined negligence, the London Avenue Canal failed during Hurricane Katrina, flooding the surrounding area and causing extensive damage to Plaintiff's property.

FACTUAL BACKGROUND REGARDING THE ORLEANS AVENUE CANAL

63.

The Orleans Avenue Canal is a drainage canal located in Orleans Parish and is connected on its north end to Lake Pontchartrain and on its south end with the SWB's Pumping Station No. 7.

64.

The levee and floodwall protection system along the Orleans Canal was incomplete at the time Hurricane Katrina struck the New Orleans area. Specifically, the embankment fronting the pump station,

which is about four hundred feet long, is six feet lower than the floodwalls along the canal. That is, the floodwalls in this area are simply missing. As a result, the levee and floodwall protection system designed and constructed by Defendants was incomplete and did not provide adequate flood protection for the surrounding area, causing extensive water damage to Plaintiff's property.

FACTUAL BACKGROUND REGARDING HURRICANE KATRINA AND THE FAILURE OF THE 17TH STREET, LONDON AVENUE, AND ORLEANS AVENUE CANALS

65.

Hurricane Katrina made landfall at 6:10 a.m. near Buras, Louisiana, on the morning of Monday, August 29, 2005 with estimated maximum winds of 117 mph.

66.

On August 29, 2005, a major breach of 17th Street Canal occurred on the Orleans Parish side of the canal between 9:00 a.m. and 9:15 a.m. The breach rapidly scoured to depths below mean sea level, allowing lake and canal water to flow through the Orleans Parish bank of the canal well after the storm surge had subsided.

67.

The flooding as a result of the breach of the 17th Street Canal was totally catastrophic, and caused extensive damage to Plaintiff's property located at xxx xxx xxx.

68.

Upon information and belief, water began to enter the Gentilly area east of the London Avenue Canal between 7:00 and 8:00 a.m. on August 29, 2005, pouring through a 200-foot wide breach in the levee/flood wall on the east side of the London Avenue Canal, just north of the Mariabeau Avenue bridge. This breach is referred to as the "south breach" of the London Avenue Canal levee.

69.

The water from the south breach of the London Avenue Canal initially inundated the Gentilly area of New Orleans, an area bounded on the west by the London Avenue Canal, on the south by Gentilly Boulevard (the Metairie/Gentilly Ridge), on the east by the Inner Harbor Navigational Canal (the Industrial Canal) and on the north by Lake Ponchatrain. This water eventually combined with flood waters from other levee breaches inundating other parts of New Orleans, including Plaintiff's property located at xxx xxx xxx.

70.

Upon information and belief, water began to enter the Gentilly area west of the London Avenue Canal sometime before 9:00 a.m. on August 29, 2005, pouring through a 400-foot wide breach in the levee/flood wall on the west side of the London Avenue Canal, just south of the Robert E. Lee Bridge. This is referred to as the "north breach" of the London Avenue Canal levee.

71.

The water from the north breach of the London Avenue Canal initially inundated the Gentilly area of the city bounded on the west by Bayou St. John, on the north by Lake Ponchatrain, on the east by the London Avenue Canal, and along the southeastern side on a line drawn along Chef Menteur Highway to Gentilly Boulevard to Broad Street where it intersects with Orleans Avenue and then northwest along Orleans Avenue to Bayou St. John. This water eventually combined with flood waters from other levee breaches, inundating other parts of New Orleans, including Plaintiff's property located at xxx xxx xxx.

72.

Upon information and belief, at approximately 9:00 a.m. on August 29, 2005, as a result of Defendants' inadequate design and construction of the floodwalls along the Orleans Avenue Canal, the

embankment fronting the pump station at the foot of the canal was overtopped and left unprotected by missing floodwalls, causing significant water damage to the surrounding area.

73.

Notably, the storm surge associated with Hurricane Katrina did not overtop the flood walls at the sites of the 17th Street, London Avenue, and Orleans Avenue Canals. Indeed, the hurricane did not exceed the designed parameters for these canals. Thus, none of the flood wall breaches in question would have occurred as a result of Hurricane Katrina alone. Rather, these breaches occurred solely as a result of Defendants' faulty and negligent engineering, design, construction, and maintenance of the 17th Street, London Avenue, and Orleans Avenue Canals.

FACTUAL BACKGROUND REGARDING THE "LAKE PONTCHARTRAIN, LOUISIANA AND VICINITY, HURRICANE PROTECTION PROJECT"

74.

The majority of the levee and/or I-wall structures surrounding the New Orleans metropolitan area were constructed, in part, under the authority of the "Lake Pontchartrain, Louisiana and Vicinity, Hurricane Protection Project" ("Lake Pontchartrain Project"). Congress first authorized the implementation of the Lake Pontchartrain Project in the Flood Control Act

of 1965 to provide hurricane protection to the areas surrounding Lake Pontchartrain. The Corps was primarily responsible for the project's design and construction.

75.

The Corps based its design and construction of the Lake Pontchartrain Project on the 1959 Standard Project Hurricane, which the Corps knew to be obsolete by 1972 when the construction of the Lake Pontchartrain Project actually began. As a result, the Corps designed and constructed the levees and floodwalls associated with the Lake Pontchartrain Project (including the 17th Street, London Avenue, and Orleans Avenue Canals) based on outdated specifications, leaving the hurricane protection system deficient and subjecting the New Orleans area to an increased threat of flooding.

76.

Additionally, as discussed *supra*, the Corps rejected the Congressionally-authorized Barrier Plan that called for a series of levees and other flood control structures, including barriers and flood control gates, to prevent storm surges from entering Lake Pontchartrain in the event of a hurricane. The Barrier Plan was purposefully selected by Congress over another alternative, the High-Level Plan, which would have excluded the barriers and flood control gates called for by the Barrier Plan and replaced

them with higher levees and flood protection structures along the lakefront and other areas. Congress rejected the High-Level Plan because it was seriously flawed in many respects, including, but not limited to, prolonged construction time, displacement of residences, less efficient floodwalls, a hampered interior drainage system, less protection to the Northshore, and increased cost.

77.

Despite Congress's approval of the Barrier Plan and rejection of the High-Level Plan, Defendants elected to implement the High-Level Plan without obtaining the required authorization from Congress and knowing of the High-Level Plan's deficiencies.

78.

By the mid 1980s, as more residences were built along the canals, the Corps proposed to provide greater protection from storm surge by implementing a parallel protection plan that called for raising the height of the existing levees and sheet pile floodwalls along each side of the canals. As discussed, *supra*, when implementing this parallel protection plan, Defendants elected to use I-walls rather than T-walls which would have provided a higher level of stability and reliability, especially in soft soil conditions. Construction of the I-walls along the 17th Street, London Avenue and Orleans Avenue Canals was completed by the end of the 1990s.

79.

On or about August 29, 2005, the I-walls designed and constructed by Defendants along the 17th Street and London Avenue Canals failed catastrophically due to Defendants' unauthorized, negligent, wanton and/or reckless, and unilateral decision to abandon the Congressionally-authorized Barrier Plan and implement the flawed parallel protection plan utilizing the I-wall design.

FACTUAL BACKGROUND REGARDING THE IPET REPORT

80.

The Corps has conceded that the failure of the New Orleans levee system, including the failure of the 17th Street, London Avenue, and Orleans Avenue Canals, was caused by the inadequate design, planning, and construction of the system's levees and floodwalls. Following Hurricane Katrina, the Corps undertook a massive investigation of the reason for the levee and flood wall failures. This investigation was coordinated by the Interagency Performance Evaluation Taskforce. ("IPET"). On March 26, 2007, IPET issued its Interim Final and Final Reports concerning the Performance Evaluation of the New Orleans and Southeast Louisiana Hurricane Protection System ("IPET Report").

81.

IPET was created by the Chief of Engineers, U.S. Army Corps of Engineers to evaluate the New Orleans hurricane protection system in light of Hurricane Katrina. IPET consisted of government, academic, and private sector scientists and engineers with extensive experience in the field of civil engineering. The report was consistently peer reviewed prior to publication.

82.

The IPET Report provides extensive background regarding the construction of the hurricane protection system and reveals that, almost from the start, construction was based on inaccurate assumptions and calculations. IPET found that deficiencies existed throughout the levee system, which was constructed at an elevation below design specifications.

83.

Overall, IPET summed up its analysis of the hurricane protection system with the concession that is performance was compromised by the incompleteness of the system, the inconsistency in levels of protection, and the lack of redundancy. Volume I of the IPET Report made the following overall conclusions regarding the failure of the levees:

- Flood control structures in the region were authorized and designed relative to a water

level datum (mean sea level), but constructed relative to a geodectic vertical datum ***incorrectly assumed to be equivalent to the water level datum. This resulted, in the case of the outfall canals, in structures built approximately 1 to 2 ft below the intended elevation.***

- Sections of the system were built below specified design elevations due to the ***use of an inaccurate relationship between the geodectic datum and mean sea level datum.***
- Coupled with the ***use of average values*** obtained from widely spaced samples in a geology with highly variable conditions, the structure was left ***with a marginal factor of safety.***
- The structures were constructed on weak and compressible soils.
- The hurricane protection in New Orleans was designed and developed in a piecemeal fashion, resulting in inconsistent levels of protection.
- ***Four breaches***, all in the outfall canals and all involving I-walls, ***occurred before water levels reached the top of the floodwalls. All were caused by foundation failures*** induced by the formation of a gap along the canal side of the floodwall. . . . ***This failure mechanism***, in particular the gap formation, ***was not considered in the original design of the structure.***

- The maintained condition of the levees was an additional negative factor in the performance of the system.

DAMAGES SUSTAINED BY PLAINTIFF

84.

Plaintiff avers that, to date, she has sustained total damages in the amount of $500,000.00, as a direct and proximate result of the negligence and/or fault of the Defendants herein. Plaintiff further avers that she continues to sustain damages as a direct and proximate result of the negligence and/or fault of the Defendants herein.

COUNT I:

NEGLIGENCE OF DEFENDANTS IN THE DREDGING OF THE 17TH STREET CANAL

85.

Plaintiff repeats and re-alleges the allegations in all preceding paragraphs as though fully set forth herein.

86.

The Corps, OLD, EJLD, and SWB had the legal responsibility and duty to Plaintiff to cause, allow, and/or conduct the dredging of the 17th Street Canal in a manner that would not compromise the safety of the canal's levee/flood wall system. As discussed

supra, the Corps, OLD, ELD, and SWB ignored federal regulations and engineering standards and entirely disregarded overwhelming evidence that the dredging of the 17th Street Canal would dangerously compromise the canal's flood protection levee.

87.

As a result of the negligence of the Corps, OLD, ELD, and SWB, the dredging of the 17th Street Canal worsened the stability of the canal's levee and flood walls and eventually contributed to the failure of the canal during Hurricane Katrina, causing extensive damage to Plaintiff. Defendants St. Paul and National Union, as the insurers of OLD and EJLD, are directly liable to Plaintiff for her damages.

88.

As a direct and proximate result of the negligence of the Corps, OLD, ELD, and SWB in the dredging of the 17th Street Canal, Plaintiff suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT II:

NEGLIGENCE OF DEFENDANTS IN THE DESIGN, CONSTRUCTION AND MAINTENANCE OF THE 17TH STREET CANAL LEVEES AND FLOOD WALLS

89.

Plaintiff repeats and re-alleges the allegations in all preceding paragraphs as through fully set forth herein.

90.

The Corps, OLD, ELD, and SWB had a legal responsibility and duty to Plaintiff to cause, allow, and/or conduct the design and construction of the levees and flood walls of the 17th Street Canal in a manner that would not compromise the safety of the canal's levee/flood wall system. As discussed *supra*, the Corps, ELD, and SWB knew or should have known of the deficiencies in the design and construction of the 17th Street Canal, particularly given the nature of the soil in the area and the height and instability of the I-walls.

91.

The Corps, OLD, ELD, and SWB negligently abandoned a Congressionally-authorized plan to install floodgates at the 17th Street Canal which would have lessened the storm surge form Hurricane

Katrina, opting instead to use a "parallel" plan pursuant to which the 17th Street Canal levee and flood wall system was inadequately designed and built.

92.

The Corps, OLD, ELD, and SWB negligently ignored multiple reports regarding the weak and unstable sand and soil below the 17th Street Canal and negligently designed and constructed the 17th Street Canal with I-walls built at 11 feet above ground, despite engineering guidelines discouraging the use of I-walls at heights greater than 7 feet above ground.

93.

The Corps, OLD, ELD, and SWB negligently failed to properly maintain and inspect the 17th Street Canal levee/flood wall system which would have led to the correction of or exposure of its deficiencies such that the failure of the system could have been prevented.

94.

As a result of the negligence of the Corps, OLD, ELD, and SWB, the design and construction of the 17th Street Canal worsened the stability of the canal's levee and flood walls and eventually contributed to the failure of the canal during Hurricane Katrina, causing extensive damage to Plaintiff. Defendants St.

Paul and National Union, as the insurers of OLD and EJLD, are directly liable to Plaintiff for its damages.

95.

As a direct and proximate result of the negligence of the Corps, OLD, ELD, and SWB in the design, construction, and maintenance of the 17th Street Canal, Plaintiff suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT III:

NEGLIGENCE OF DEFENDANTS IN THE DESIGN, CONSTRUCTION AND MAINTENANCE OF THE LONDON AVENUE CANAL LEVEES AND FLOODWALLS

96.

Plaintiff repeats and re-alleges the allegations in all preceding paragraphs as through fully set forth herein.

97.

The Corps, OLD, ELD, and SWB had a legal responsibility and duty to Plaintiff to cause, allow, and/or conduct the design and construction of the

levees and flood walls of the London Avenue Canal in a manner that would not compromise the safety of the canal's levee/flood wall system. As discussed *supra*, the Corps, OLD, ELD, and SWB knew or should have known of the deficiencies in the design and construction of the London Avenue Canal, particularly given the nature of the sand and soil in the area and the height and instability of the I-walls.

98.

The Corps, OLD, ELD, and SWB negligently abandoned a Congressionally-authorized plan to install floodgates at the London Avenue Canal which would have lessened the storm surge form Hurricane Katrina, opting instead to use a "parallel" plan pursuant to which the London Avenue Canal levee and flood wall system was inadequately designed and built.

99.

The Corps, OLD, ELD, and SWB negligently entirely ignored multiple reports regarding the weak and unstable sand and soil below the London Avenue Canal and negligently designed and constructed the London Avenue Canal with I-walls built at 11 feet above ground, despite engineering guidelines discouraging the use of I-walls at heights greater than 7 feet above ground.

100.

The Corps, OLD, ELD, and SWB negligently failed to properly maintain and inspect the London Avenue Canal levee/flood wall system which would have led to the correction of or exposure of its deficiencies such that the failure of the system could have been prevented.

101.

As a result of the negligence of the Corps, OLD, ELD, and SWB, the design and construction of the London Avenue Canal worsened the stability of the canal's levee and flood walls and eventually contributed to the failure of the canal during Hurricane Katrina, causing extensive damage to Plaintiff. Defendants St. Paul and National Union, as the insurers of OLD and EJLD, are directly liable to Plaintiff for her damages.

102.

As a direct and proximate result of negligence of the Corps, OLD, ELD, and SWB in the design, construction, and maintenance of the London Avenue Canal, Plaintiff suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT IV:

NEGLIGENCE OF DEFENDANTS IN DESIGN, CONSTRUCTION AND MAINTENANCE OF THE ORLEANS AVENUE CANAL LEVEES AND FLOODWALLS

103.

Plaintiff repeats and re-alleges the allegations in all preceding paragraphs as through fully set forth herein.

104.

The Corps, OLD, ELD, and SWB had a legal responsibility and duty to Plaintiff to cause, allow, and/or conduct the design and construction of the levees and flood walls of the Orleans Avenue Canal in a manner that would not compromise the safety of the canal's levee/flood wall system. As discussed *supra*, the Corps, OLD, ELD, and SWB knew or should have known of the deficiencies in the design and construction of the Orleans Avenue Canal, particularly given the embankment fronting the pump station at the foot of the canal that was left unprotected by missing floodwalls.

105.

As a result of the negligence of the Corps, OLD, ELD, and SWB, the design and construction of the Orleans Avenue Canal failed to provide adequate flood protection to the surrounding area, causing

extensive damage to Plaintiff. Defendants St. Paul and National Union, as the insurers of OLD and EJDL, are directly liable to Plaintiff for her damages.

106.

As a direct and proximate result of the negligence of the Corps, OLD, ELD, and SWB in the design, construction, and maintenance of the London Avenue Canal, Plaintiff suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT IV:

DEFENDANTS' NEGLIGENCE IN IMPLEMENTING THE "LAKE PONTCHARTRAIN, LOUISIANA AND VICINITY, HURRICANE PROTECTION PROJECT"

107.

Plaintiff repeats and re-alleges the allegations in all preceding paragraphs as through fully set forth herein.

108.

The Corps, OLD, ELD, and SWB had a legal responsibility and duty to Plaintiff to cause, allow, and/or conduct the implementation of the Lake Pontchartrain Project in a manner that would not compromise the safety of the hurricane protection system. As discussed *supra*, the Corps, OLD, ELD, and SWB knew or should have known of the deficiencies in the implementation of the Lake Pontchartrain Project as the Corps, OLD, ELD, and SWB purposefully rejected the Congressionally-authorized Barrier Plan and instead implemented a parallel protection plan utilizing a flawed I-wall design.

109.

As a result of the negligence of the Corps, OLD, ELD, and SWB, the 17th Street and London Avenue Canals failed catastrophically, causing Plaintiff to suffer extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial. Defendants St. Paul and National Union, as the insurers of OLD and EJLD, are directly liable to Plaintiff for her damages.

COUNT V:

STRICT LIABILITY

110.

Plaintiff repeats and re-alleges the allegations in all preceding paragraphs as through fully set forth herein.

111.

The Corps, OLD, ELD, and SWB had, at all relevant times, the care, custody and control, and thus the *garde* of the 17th Street, London Avenue, and Orleans Avenue Canals and the levees/floodwalls adjacent thereto. As such they are strictly liable to Plaintiff for his damages resulting from the vices and/or defects within these canals and their levees/floodwalls, in accordance with Louisiana Civil Code article 2317, *et seq.*

112.

The Corps, OLD, ELD, and SWB knew, or in the exercise of reasonable care should have known, of the vices that caused Plaintiff's damages. Defendants St. Paul and National Union, as the insurers of OLD and EJLD, are directly liable for Plaintiff's injuries. Further, in the exercise of reasonable care by the Corps, OLD, ELD, and SWB, Plaintiff's damages could have been prevented.

113.

Plaintiff expressly pleads the doctrine of *Res Ipsa Loquitur* against each and all of the Defendants, as may be appropriate under the circumstances and permitted by law.

COUNT VI:

NUISANCE

114.

Plaintiff repeats and re-alleges the allegations in all preceding paragraphs as through fully set forth herein.

115.

As the proprietors of the 17th Street, London Avenue, and Orleans Avenue Canals, the Corps, OLD, ELD, and SWB had a duty, pursuant to Louisiana Civil Code article 667, to refrain from creating a nuisance with respect to these canals. Because of the negligence of the Corps, OLD, ELD, and SWB, however, Plaintiff has been deprived from the enjoyment of his property. Thus, the Corps, OLD, ELD, and SWB have created a nuisance by ignoring the hazardous conditions in the 17th Street, London Avenue, and Orleans Avenue Canals. Defendants St. Paul and National Union, as the insurers of OLD and EJSD, are directly liable to Plaintiff for her damages.

116.

Defendants have violated the common law doctrine of nuisance. The negligent and/or reckless actions of Defendants in creating and ignoring the hazardous conditions in the hurricane protection system have caused unique and significant harm as discussed *supra* and have deprived Plaintiff from the use and enjoyment of its property. Thus, Defendants are liable for Plaintiff's damages As a result of Defendants' creation of a nuisance and violation of their federal common law duty, Plaintiff suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that:

(1) Defendants be held liable for all of Plaintiff's damages caused by Defendants' negligence in the dredging of the 17th Street Canal, including, but not limited to, Plaintiff's loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(2) Defendants be held liable for all of Plaintiff's damages caused by Defendants' negligence in the design, construction, and maintenance of the 17th Street Canal, including, but not limited to, Plaintiff's loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(3) Defendants be held liable for all of Plaintiff's damages caused by Defendants' negligence in the design, construction, and maintenance of the London Avenue Canal, including, but not limited to, Plaintiff's loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(4) Defendants be held liable for all of Plaintiff's damages caused by Defendants' negligence in the design, construction, and maintenance of the Orleans Avenue Canal, including, but not limited to, Plaintiff's loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(5) Defendants be held liable for all of Plaintiff's damages caused by Defendants' negligence in the implementation of the Lake Pontchartrain Project,

including, but not limited to, Plaintiff's loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(6) Defendants be held strictly liable for Plaintiff's damages resulting from the vices and/or defects within these canals and their levees/floodwalls, in accordance with Louisiana Civil Code article 2317, *et seq.* and the doctrine of *Res Ipsa Loquitur*;

(7) Defendants be held liable for Plaintiff's damages resulting from Defendants' creation of a nuisance in creating and ignoring the hazardous conditions of the 17th Street, London Avenue and Orleans Avenue Canals.

(8) Defendants be held liable for all of Plaintiff's attorneys fees and costs associates with this litigation pursuant to the Federal Tort Claims Act and/or the Equal Access to Judgments Act;

(9) Defendants be held liable for all pre-judgment and post-judgment interest on all amounts awarded to Plaintiff; and

(10) Any other equitable and general relief in the nature of this case will allow.

/s/ Martha Y. Curtis
MARTHA Y. CURTIS
20446 (T.A.)
CHRISTOPHER T. CHOCHELES
#26848
SHER GARNER CAHILL RICHTER KLEIN & HILBERT, L.L.C.
909 Poydras Street, 27th Floor
New Orleans, Louisiana 70112
Telephone: (504) 299-2100
Facsimile: (504) 299-2300
ATTORNEYS FOR DOROTHY REESE

EXHIBIT 2

CASH SALE

File # 05-9423

STATE OF LOUISIANA
PARISH OF ASCENSION

BE IT KNOWN, that on this 14th day of September, 2005;

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified within and for the above Parish and State, and in the presence of the undersigned competent witnesses, personally came and appeared as Sellers:

> AARON J. CHAISSON, JR. and LENA O. CHAISSON, both persons of the full age of majority, married to and living together, domiciled in the Parish of Ascension, Louisiana, whose permanent mailing address is declared to be xxxxx xxxxx xxxxx xxxxx, xxxxx, xx xxxxx; the said Lena D. Chaisson being represented herein by her duly authorized agent and attorney in fact. Aaron J. Chaisson, Jr., duly authorized pursuant to the Power of Attorney which is attached hereto and made a part hereof; (hereinafter referred to as Seller)

who declared that for the price of ONE HUNDRED NINETY-FIVE THOUSAND AND 00/100 ($195,000.00) DOLLARS, case in hand paid, receipt of which is hereby acknowledged, Sellers do hereby sell and deliver, with full warranty of title and subrogation to

all rights and actions of warranty Sellers may have unto Buyers:

> KERN A. REESE and DOROTHY F. REESE, both persons of the full age of majority, married to and living together, domiciled in the Parish of East Baton Rouge, Louisiana, whose permanent mailing address is declared to be xxxxx xxxxx xxxxx, xxxxx, xx xxxxx: (hereinafter referred to as Buyer)
>
> MICHELLE THERESA BUTLER, a single person of the full age of majority, having never been married, domiciled in the Parish of East Baton Rouge, Louisiana, whose permanent mailing address is declared to be xxxxx xxxxx xxxxx, xxxxx, xx xxxxx; (hereinafter referred to as Buyer)

who acknowledge delivery and possession of the following described property:

> One (1) certain lot or parcel of ground, together with all the buildings and improvements thereon, and all of the rights, ways, privileges, servitudes, appurtenances and advantages thereunto belonging or in anywise appertaining, situated in the Parish of East Baton Rouge, State of Louisiana, in that subdivision known as SHERWOOD FOREST, SIXTEENTH FILING, PART TWO (2), and designated on the official plan thereof, on file and of record in the office of the Clerk and Recorder of the Parish of East Baton Rouge, State of Louisiana, as LOT NUMBER ONE THOUSAND SIX HUNDRED

EIGHTEEN (1618), said subdivision, said lot having such measurements and dimensions and being subject to such servitudes and restrictions as are more particularly shown on said map.

THE SUBJECT PROPERTY IS BEING SOLD "AS IS" AND THE SALE WILL BE MADE WITHOUT ANY WARRANTIES, EXPRESS OR IMPLIED, AS TO FITNESS FOR USE OR CONDITION OF THE ABOVE DESCRIBED PROPERTY, FURTHER, BUYER DECLARES THAT HE HAS EXAMINED THE SUBJECT PROPERTY AND HE SPECIFICALLY WAIVES ALL RIGHTS AGAINST SELLER THAT HE MAY HAVE FOR REDHIBITORY DEFECTS AND MORE PARTICULARLY WAIVES ALL OF THOSE RIGHTS PROVIDED FOR PURSUANT TO LOUISIANA CIVIL CODE ARTICLES 2520 THROUGH 2548.

The said property is sold, conveyed and accepted subject to any and all valid restrictions, servitudes, mineral conveyances and/or reservations of record affecting same, if any.

To have and to hold said property unto Buyers, Buyers' heirs, successors and assigns, forever.

All parties signing the within instrument, either as parties or as witnesses, have declared themselves to be of the legal capacity.

All agreements and stipulations, and all of the obligations herein assumed shall inure to the benefit

of and be binding upon the heirs, successors and assigns of the respective parties.

The production of mortgage, conveyance and/or tax certificates are dispensed with by the parties hereto. All taxes assessed against the property herein conveyed have been prorated as of the date of sale.

THUS DONE AND SIGNED at my office in the City of Prairieville, State of Louisiana, on the date first hereinabove written, in the presence of the undersigned competent witnesses and me, Notary, after due reading of the whole.

WITNESSES:

/s/ Brandy A. Cavalier
Brandy A. Cavalier

/s/ Misty Turner
Misty Turner

/s/ Aaron J. Chaisson, Jr.
Aaron J. Chaisson, Jr.

/s/ Lena D. Chaisson
Lena D. Chaisson

/s/ Kern Anthony Reese
Kern Anthony Reese

/s/ Dorothy Faye Farmer Reese
Dorothy Faye Farmer Reese

/s/ Michelle Theresa Butler
Michelle Theresa Butler

/s/ Robert M. Adams, Jr.
Notary Public
ROBERT M. ADAMS, JR.
Notary # 35631

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

MICHAEL G. AND MADLYN P. BAGNERIS

vs.

UNITED STATES OF AMERICA, BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT, BOARD OF COMMISSIONERS OF THE EAST JEFFERSON LEVEE DISTRICT, SEWERAGE AND WATER BOARD OF NEW ORLEANS, ST. PAUL FIRE & MARINE INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, BOARD OF COMMISSIONER FOR THE PORT OF NEW ORLEANS, CSX CORPORATION, CSX TRANSPORTATION, INC., & THE PUBLIC BELT RAILROAD COMMISSION FOR THE CITY OF NEW ORLEANS

CIVIL ACTION NO. 07-5378

SECTION SECT. K MAG. 2

JUDGE _____

****

COMPLAINT FOR DAMAGES

(Filed Sep. 4, 2001)

NOW INTO COURT, through undersigned counsel, comes Plaintiffs, Michael G. and Madlyn P. Bagneris, who respectfully submit their Complaint for Damages as follows:

INTRODUCTION

1.

This Complaint arises out of catastrophic failures of, and deficiencies in, the hurricane protection system surrounding the Parish of Orleans, State of Louisiana, which occurred on and after August 29, 2005. These failures and deficiencies caused and substantially contributed to the inundation of approximately 80% of the New Orleans metropolitan area, causing extensive harm and loss of life and destroying or rendering uninhabitable approximately 160,000 residences and buildings.

2.

Plaintiffs owned and/or resided at the property located at xxx xxx xxx, New Orleans, Louisiana, 70112, on or about August 29, 2005 when the New Orleans levee system failed. The failure of the New Orleans levee system, the horrific result of man-made acts, caused extensive damage to Plaintiffs' residence and contents among other damages discussed *infra*.

PARTIES

3.

Plaintiffs are citizens of the state of Louisiana and domiciled in the state of Louisiana. On or about February 28, 2007, Plaintiffs each presented claims to the United States Army Corps of Engineers (the "Corps") for damages arising out of the failure of the New Orleans levee and floodwall system pursuant to the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.* The Corps acknowledged receipt of Plaintiffs' claim and assigned the following claim numbers: 07N15T0095263 and 07N15T0163751 to Madlyn P. Bagneris, and 07N15T0163752 and 07N15T0095264 to Michael G. Bagneris. *See* Exhibit A *in globo*. On or about February 28, 2007, Plaintiffs also each presented claims to the Corps for damages arising out of the failure of the New Orleans levee and floodwall system pursuant to the Suits in Admiralty Act, 46 U.S.C. §30901-18, the Public Vessels Act, 46 U.S.C. §46-31101-13, the Admiralty Extension Act, 46 U.S.C. §30101, and the general maritime law of the United States. The Corps acknowledged receipt of Plaintiffs' second claims and assigned the following claim numbers: 07N15T0094938 and 07N15T0256837 to Madlyn P. Bagneris, and 07N15T0094937 and 07N15T0256838 to Michael G. Bagneris. *See* Exhibit B *in globo*. Six months have elapsed since the presentation of Plaintiff's claims, and the United States Army Corps of Engineers has failed to act by either accepting or rejecting Plaintiffs' claims. Thus, such

failure must presumably be considered a denial of Plaintiffs' claims.

4.

Defendant United States of America is a sovereign government amenable to suit for civil liability in accordance with the federal laws and regulations as set forth herein. The United States Army Corps of Engineers is an extension of the United States government (collectively the "Corps").

5.

Defendant Board of Commissioners for the Orleans Levee District ("OLD") is a local government entity created by Louisiana Revised Statute §38:291, amenable to suit, and domiciled in the Parish of Orleans, State of Louisiana.

6.

Defendant Sewerage and Water Board of New Orleans ("SWB") is a political subdivision of the State of Louisiana created by Louisiana Revised Statute §33:4071 *et seq.*, amenable to suit, and domiciled in the Parish of Orleans, State of Louisiana.

7.

Defendant Board of Commissioners of the East Jefferson Levee District ("EJLD") is a political

subdivision of the State of Louisiana created by Louisiana Revised Statute §38:291, amenable to suit, and domiciled in the Parish of Jefferson, State of Louisiana.

8.

Defendant St. Paul Fire and Marine Insurance Company ("St. Paul") is a foreign insurance company authorized to do and doing business within the State of Louisiana. At all times relevant hereto, St. Paul had in full force and effect a policy of liability insurance, under the terms, provisions, and conditions of which it assumed liability for the acts and/or negligence of its insured, the Board of Commissioners of the Orleans Levee District, and is therefore liable to Plaintiffs. Plaintiffs assert their claims against St. Paul under the Louisiana Direct Action Statute, LSA-R.S. 22:655.

9.

Defendant National Union Fire Insurance Company of Pittsburgh ("National Union") is a foreign insurance company authorized to do and doing business within the State of Louisiana. At all times relevant hereto, National Union had in full force and effect a policy of liability insurance, under the terms, provisions, and conditions of which it assumed liability for the acts and/or negligence of its insured, the Board of Commissioners of the East Jefferson Levee District, and is therefore liable to Plaintiffs. Plaintiffs

assert their claims against National Union under the Louisiana Direct Action Statute, LSA-R.S. 22:655.

10.

Defendant The Board of Commissioners of the Port of New Orleans ("PNO") is a local governmental entity created by Louisiana Revised Statute §34:21, amenable to suit, and domiciled in the Parish of Orleans, State of Louisiana.

11.

Defendant CSX Corporation ("CSX Corp.") is a foreign corporation doing business in the Parish of Orleans, State of Louisiana.

12.

Defendant CSX Transportation, Inc. ("CSX Inc.") is a foreign corporation doing business in the Parish of Orleans, State of Louisiana.

13.

Defendant Public Belt Railroad Commission for the City of New Orleans ("PBR") is an entity amenable to suit and domiciled in the Parish of Orleans, State of Louisiana.

14.

Plaintiffs aver that this matter is timely to all Defendants and is within the applicable statute of limitations as there is a related class action proceeding pending in this Court in the matter captioned *In re Katrina Canal Breaches Litigation*, No. 05-4182(K)(2) (Ref. LEVEE). As the United States Supreme Court recognized in *Crown, Cork, & Seal Co., Inc. v. Parker,* 462 U.S. 345 (1983), "'the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.'" *Id.* at 353-54 (quoting *American Pipe & Constr. Co. v. Utah*, 454 U.S. 538, 554 (1974)).

JURISDICTION

15.

The Court maintains subject matter jurisdiction over this action pursuant to 28 U.S.C. §1346(b) (Defendant United States) and 28 U.S.C. §2671, *et seq.* (Federal Tort Claims Act), violations of law of the United States, including, but not limited to, 16 U.S.C. § 1451 *et seq.* (Coastal Zone Management Act), and, 33 U.S.C.§403 *et seq.* (River & Harbors Act), and, alternatively, for violation of the Constitution and Law of the State of Louisiana as well as the Constitution and Laws of the United States.

16.

Plaintiffs have presented to the Corps the written administrative claims required by the provisions of 28 U.S.C. §2671, *et seq.* (Federal Tort Claims Act) and in all respects have complied with the provisions of this statute. As discussed *supra*, a period of at least six months has elapsed since the filing of Plaintiffs' written administrative claims.

17.

Alternatively, Plaintiffs invoke jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction). Additionally, and in the alternative, jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1367 in as much as this Court has supplemental jurisdiction over all state law claims herein arising out of the same case or controversy.

18.

Alternatively, Plaintiffs plead admiralty and maritime jurisdiction and causes of action under the Admiralty Extension Act, 46 U.S.C. §30101, the Suits in Admiralty Act, 46 U.S.C. § 30901-18, and/or the Public Vessels Act, 46 U.S.C. § 31101-13. Upon information and belief, one or more vessels owned, operated, and/or controlled by the United States government in the construction of the levees, floodwalls, and canals at issue in this Complaint caused and/or contributed to Plaintiff's damages. Plaintiffs

have presented to the Corps the written administrative claims required by the provisions of 46 U.S.C. §30101 (Admiralty Extension Act). A period of at least six months has elapsed since the filing of Plaintiffs' written administrative claims.

VENUE

19.

Venue is proper in this district pursuant to 28 U.S.C. § 1391 because the Defendants' negligent and wrongful actions occurred in the Eastern District of Louisiana, a substantial part of the events and omissions giving rise to this action occurred in the Eastern District of Louisiana, and the properties that are the subject of this action are situated within the Eastern District of Louisiana.

WAIVER OF SOVEREIGN IMMUNITY

20.

The United States of America and, thus, the Corps waived their sovereign immunity in connection with the claims asserted in this suit by the enactment of the Federal Tort Claims Act, 28 U.S.C. § 2671 ("FTCA"). While Plaintiffs believe that all of its claims against the Corps are derived from the FTCA applying the tort and other laws of the State of Louisiana, out of an abundance of caution, Plaintiffs alternatively plead admiralty and maritime jurisdiction and causes of action under the Admiralty

Extension Act, 46 U.S.C. §30101, the Suits in Admiralty Act, 46 U.S.C. § 30901-18, the Public Vessels Act, 46 U.S.C. § 31101-13, the Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq*, and the River & Harbors Act, 33 U.S.C.§403 *et seq*.

21.

Any immunity invoked by the Corps under 33 U.S.C. §702(c) is not available because the provisions of this Act do not apply, have not been complied with, and/or the liability of the Corps is not predicated on flood control activity. The activities undertaken by the Corps in connection with this litigation are not activities forming part of a federal flood control project, nor are the Corps's activities in connection with an authorized federal control project. Accordingly, the provisions of the Flood Control Act of 1928, 33 U.S.C. §702(c), do not apply as a basis for governmental immunity. Furthermore, the United States Court of Appeals for the Fifth Circuit has already held that the Flood Control Act of 1928, 33 U.S.C. §§ 702(c), does not immunize the United States of America for its maritime activities related to the Mississippi River Gulf Outlet ("MR-GO"). *Graci v. United States*, 456 F.2d 20 (5th Cir. 1971).

FACTUAL BACKGROUND REGARDING THE 17TH STREET CANAL

A. The History of the 17th Street Canal

22.

The canal known today as the "17th Street Canal" forms a significant portion of the boundary between Orleans Parish, Louisiana and Jefferson Parish, Louisiana. Historically, the 17th Street Canal has also been known as the "Metairie Outlet Canal," the "Metairie Outfall Canal," the "Metairie Relief Canal," and the "Upperline Canal."

23.

The 17th Street Canal originated at the start of the 1850's as a canal dug through swampy ground to provide a right-of-way. It was located where the Jefferson and Lake Pontchartrain Railway was built. The railway connected the town once called Carrollton with a shipping port on Lake Pontchartrain in the area today know as Bucktown. Figure 1 depicts the current location of the 17th Street Canal.

[Figure 1 Omitted In Printing]

24.

In 1858, a secondary canal was built, connecting the original canal to the river side of the Metairie Ridge. This spur canal was situated alongside a projected street numbered "17th Street," and, thus, the canal became known as the "17th Street Canal." The term "17th Street Canal" eventually referred to

the original, larger canal to which this spur canal connected.

25.

The community of Bucktown, where the northern end of the 17th Street Canal enters Lake Pontchartrain, was founded more than one hundred years ago as a group of fishing and hunting camps along the canal and Lake Pontchartrain. The earliest structures were wooden huts raised on stilts, and the canal served as a harbor and a mode of transportation for fishing boats.

26.

More substantial development in this area occurred during the mid-19th century with the construction of a commercial wharf and a resort called "Lakeport." Steamboats docked at the entrance to the New Basin Canal (now Pontchartrain Boulevard) and at the terminus of the Jefferson and Lake Pontchartrain Railway (presently Bucktown).

27.

The SWB took over the operation of the 17th Street Canal at the end of the 19th century. The canal was re-dredged in 1897 and again in 1929. In 1913, the SWB completed the construction of Pumping Station No. 6, which drained a large portion of New Orleans through the canal. Until recent years,

the 17th Street Canal was home to a fleet of approximately one hundred shrimp boats. The fleet previously had a lease agreement with the defendant SWB.

28.

The 17th Street Canal historically is, and at all times pertinent herein has been, a navigable waterway in New Orleans that flows into Lake Pontchartrain.

B. <u>The 17th Street Canal Dredging Project</u>

29.

On July 15, 1974, the SWB initiated a project to improve drainage through the 17th Street Canal. Initially, this project called for the dredging of 2.4 miles of the canal from Pump Station No. 6 to Lake Pontchartrain to remove sediment from the canal bottom and to reshape the canal cross-section for the improvement of flow and the pump capacity of Pump Station No. 6. The removal of approximately 85,000 cubic yards of bottom sediment was anticipated.

30.

Because dredging projects in navigable waters of the United States require a Department of the Army permit pursuant to the River & Harbors Act, the SWB filed an application with the Corps for a "Permit to Discharge or Work in Navigable Waters and their

Tributaries." The Operations Division of the Corps is responsible for the issuance of permits to dredge navigable waterways. Hence, the issuance of the dredging permit for the 17th Street Canal was the province of the Corps's Operating Division, and not, for example, the Corps's Engineering Division, which is responsible for flood control.

31.

The permit approval process required the SWB also to obtain approval from, among others, the Louisiana Department of Public Works. In August 1974, the Louisiana Department of Public Works responded to the 17th Street Canal dredge permit application by stating it could not complete a review of the application because the applicant (SWB) ***had no soil data substantiating the stability or integrity of the canal's levees.***

32.

On May 23, 1977, the Corps returned the dredging application with no action because the SWB had failed to furnish information requested by, among others, the Louisiana Department of Public Works.

33.

In 1978, the SWB retained a civil engineering firm, Modjeski and Masters, Inc. ("M&M"), to provide a plan for the design and implementation of the

dredging project. On August 23, 1979, M&M submitted a second dredging permit application on behalf of the SWB. On December 29, 1980, M&M re-submitted the dredging permit application after environmental concerns were raised relative to the disposal of the dredged material in Lake Pontchartrain and on the banks of the canal.

34.

On January 28, 1981, in response to inquiries about the impact of the dredging on existing levees, M&M provided the Corps a memorandum addressing the stability of the existing levees and sheet pile wall along the canal. M&M's memorandum indicated that at three of the six test locations, the factors of safety ***fell below the required values set by the Corps.*** The handwritten report specifically stated that ***"two locations yielded low factors of safety due to . . . the existence of very soft clays. . . . "***

35.

On March 5, 1981, the Corps issued an internal memorandum addressing the soil stability analyses provided by M&M, which acknowledged that, in connection with the proposed dredging of the canal, safety factors were substantially below the minimum 1.30 factor of safety, requiring that the project be redesigned. The specific location of the canal's levee system to which this internal memorandum referred

coincides with the area where the 17th Street Canal breached during Hurricane Katrina.

36.

On March 31, 1981, the Corps held a public hearing regarding the 17th Street Canal dredging permit application. Discussions took place regarding whether raising the existing sheet pile wall along the canal, as opposed to dredging to deepen the canal, would provide a greater cross-section and greater pump capacity. The consulting engineer representing M&M voiced his concerns about widening the canals and stated that ***not only were the levees already in violation of the Corps's engineering standards for levee stability but that dredging attempts to remove material adjacent to the levees would only worsen the stability problem.***

37.

On April 20, 1981, in response to concerns that the proposed dredging of the 17th Street Canal would negatively impact the existing canal levee, M&M announced a preliminary plan to install sheet pile walls with concrete caps prior to any dredging or excavation. The sheet pile walls were to be of a sufficient height to meet all applicable flood protection criteria. An internal Corps memorandum dated June 16, 1981, based on a review of this proposal by M&M, acknowledged that a number of levee and flood wall

stability problems were likely to occur should the SWB dredging be granted.

38.

An internal memorandum from the Corps's Engineering Division to the Corps's Operations Division, dated February 12, 1982, noted the existence of a stability problem in the 17th Street Canal at a location where excavation would directly tap the sands underlying the levee. The memorandum suggested that a stability analysis be performed for the land side of the canal, incorporating effects of seepage to determine what corrective action might be needed. Sands underlay the entire 2.4 miles of the 17th Street Canal, from Pumping Station No. 6 to Lake Pontchartrain, and the stability problem recognized in this memorandum, therefore, cannot be confined to any one section of the canal.

39.

On August 23, 1982, Eustis Engineering Company ("Eustis") provided M&M with a more comprehensive subsoil investigation report, which in pertinent part recognized that measures "should be taken" because of "the possibility of a blow-out during extreme high water in the canal." The report also identified "preventive measures," including "the installation of a seepage cutoff through the levee crown, installation of pressure relief wells near the land side toe of the levee, and sealing the canal

bottom." Eustis's recommendations were restricted to only specific areas of the canal, however, and not to the entire canal levee system. On November 30, 1982, M&M furnished the Corps with copies of Eustis' soil investigation report.

40.

On February 22, 1983, the Chief of the Corps's Engineering Division advised the SWB that the Corps believed "the installation of relief wells would be an appropriate way to provide the necessary assurance against uplift" of the 17th Street Canal's sheet piles.

41.

On May 9, 1983, M&M submitted, on behalf of the SWB, a new permit application for the 17th Street Drainage Canal Improvement Project. This application was to supersede the application for Phase I, submitted on December 29, 1980, and Phase II, submitted on April 20, 1981, by combining the two phases into one project with the project limits being Pump Station No. 6 on the south and 370.0 feet north of the Bucktown Pedestrian Bridge. The project now envisioned the ***removal of 470,000 cubic yards*** of canal bottom whereas the original plan called for the removal of 85,000 cubic yards.

42.

On July 27, 1983, Eustis submitted a revised soil stability report, which both confirmed the potential for a blow-out at the land side toe of the levee and extended the area of concern to the pumping station. In this report, Eustis recommended dredging a test section in the 17th Street Canal to study the hydrostatic uplift pressure.

43.

From November 29 to December 16, 1983, a test section was dug just south of Interstate 10. Six piezometers were installed on the Jefferson Parish side of the 17th Street Canal to monitor closely changes in the hydrostatic pressures before, during, and after completion of the excavation. Eustis submitted a report on the test dredging to the Corps on January 17, 1984. The report concluded that the piezometers monitored no relevant changes upon the dredging of the test section. The report further concluded that the possibility of a blow-out during high-water conditions in the canal was probably slight. The piezometer study of the test section did not account, however, for the pre-existing, permeable soils of the canal, and, therefore, the study's conclusions as to stability and permeability were unreliable.

44.

On June 13, 1984, the Corps issued a permit to "dredge to enlarge and maintain an area and install

and maintain flood walls and mooring structures, in the 17th Street Canal (Metairie Relief Canal) from Pumping Station No. 6 to a point about 400 feet north of the Bucktown Pedestrian Bridge . . . " The "Statement of Findings" issued with the permit stated that factors considered in issuing the permit included, *inter alia*, "navigation," both present and prospective flood heights and flood plain use, and "other public interests."

45.

The dredging project was ultimately divided into the following phases: Phase I from Pump Station No. 6 to Interstate 10; Phase II-A from Interstate 10 to Hammond Highway – Orleans side; Phase II-B from Interstate 10 to Hammond Highway – Jefferson side; and Phase III from Hammond Highway to Lake Pontchartrain.

46.

Phase I was completed June 1, 1984. Because the SWB and the OLD could not reach an agreement with EJLD regarding Phase II of the Project, however, an extension of the permit work was granted by the Corps on February 20, 1987.

47.

On April 24, 1987, the Corps created a drawing with a sheet pile design that indicated that the sheet

pile tips were located 16 feet lower than the bottom of the 17th Street Canal. Even as the Operations Division of the Corps was addressing the SWB permit, therefore, its Engineering Division was addressing levee wall design that might incorporate the sheet piles that were permitted under the dredging project.

48.

On August 11, 1988, the SWB issued the work order for Phase III of the dredging project, and the job was completed on December 6, 1989. The work order for Phase II-A of the dredging project, which included the installation of the sheet piles on the Orleans Parish side of the canal, was issued on July 4, 1990, and the job was completed on January 10, 1992 by Boh Bros. Construction Co., Inc.

49.

The dredging activity conducted in the 17th Street Canal pursuant to the SWB permit was specified contractually to entail "bucket dredging" from a series of flex-float barges in the canal. The barges constituted vessels in navigation for the time period during which the dredging occurred.

C. The Construction of 17th Street Canal Concrete Monoliths

50.

Without any congressional authorization or re-authorization, the Corps unilaterally deviated from a congressionally authorized "Barrier Plan," which called for the installation of floodgates at the mouth of the 17th Street Canal (at Lake Pontchartrain). Defendants SWB and OLD objected to the installation of these floodgates. The Corps thereafter proposed a "Parallel Protection Plan" for the 17th Street Canal, which called for increasing the height of the flood barriers on the east and west banks of the canal. This plan was part of an overall "High Level Plan," which replaced the "Barrier Plan" even though this change was not authorized by Congress.

51.

In connection with the "High Level Plan," the Corps considered three options – levees, T-walls, and I-walls. The Corps rejected the use of levees and T-walls because such construction was purportedly not economically justified. Instead, under the auspices of the Corps acting in connection with the OLD, the 17th Street Canal's flood walls were constructed with an "I-wall" design, which called for the construction of a concrete monolith on top of the existing sheet pile (in place from the dredging project). Figure 2 depicts the differences in the design of the I-walls, and levees.

[Figure 2 Omitted In Printing]

52.

The U.S. Army Corps of Engineers Manual on Engineering, Design and Construction of Levees, dated April 30, 2000, states that for stability reasons, flood walls utilizing the "I-wall" design rarely exceed seven (7) feet above ground surface and that an inverted "T-wall" design is used when walls higher than seven feet are required. ***Nonetheless, the I-walls on the 17th Street Canal were built in concrete sections that rise eleven (11) feet about the ground.***

53.

Further, upon information and belief, Eustis performed a soil analysis in 1981, which entailed borings along the 17th Street Canal's levee. The borings revealed alternating layers of soft clay and black humus or peat – a soft, spongy soil comprised of decaying trees and other organic material – located fifteen to twenty-one feet below sea level. This layer of humus and peat substantially reduced the strength of the soil, particularly its strength in resisting lateral pressure and its ability to support the levee and flood walls under pressure from flood water.

54.

Despite Eustis's findings regarding the weak soil, however. the Corps elected to build the walls of the

17th Street Canal with steel sheet piling driven to a depth that was seventeen (17) feet below sea level – either above or in the middle of the layers of weak soil. To make matters worse, the soil adjacent to the 17th Street Canal levee subsided significantly after construction of the levee and flood wall, greatly reducing the amount of support that the land behind the levee provided against the pressure of flood waters.

55.

Then, in 1993, C.R. Pittman Construction Company, Inc. ("Pittman") was retained for the construction of the concrete monoliths atop the steel sheet pile wall along with the 17th Street Canal. Pittman reported to the Corps that it was encountering major problems – specifically, the sheet pile walls and concrete monoliths are beginning to lean towards the canal side as the soil foundation was not of sufficient strength, rigidity and stability. Despite these concerns and problems, however, the Corps allowed the construction of the I-walls to continue, and Pittman built the concrete monoliths on top of the sheet pile driven into the unstable soil.

56.

Altogether, Defendants either failed to account for the soil and flood wall stability problems associated with the 17th Street Canal or proceeded with the engineering, design, and construction of the 17th

Street Canal despite such problems. As a result of Defendants' combined negligence, the 17th Street Canal failed during Hurricane Katrina, flooding the surrounding area and causing extensive damage to Plaintiff's property.

FACTUAL BACKGROUND REGARDING THE LONDON AVENUE CANAL

57.

The London Avenue Canal was constructed in the first half of the 19th century through an area that was mostly swampland and later became part of the City of New Orleans. The canal originally served a dual purpose of commerce and drainage, *i.e.*, it both permitted small boat traffic from Lake Pontchartrain to a section of New Orleans and provided for swamp drainage. Figure 1 depicts the current location of the London Avenue Canal.

58.

The London Avenue Canal historically is, and at all times pertinent herein has been, a navigable waterway within the meaning of the general maritime law.

59.

The Corps, in coordination with the OLD and SWB, was responsible for the design and construction of the London Avenue Canal's levee system.

60.

A major project to upgrade the flood walls and bridges along the London Avenue Canal began in the early 1980's. The Corps had previously proposed placing a floodgate at the hurricane levees where the London Avenue Canal entered Lake Pontchartrain to provide protection from storm surge. The OLD and SWB objected to this plan, however, and, instead, favored building and raising the height of the parallel flood walls and levee structures along each side of the canal (the aforementioned "Parallel Protection Plan"). By 1991, the corps, OLD and SWB had decided to proceed with this latter plan.

61.

The resulting flood walls along the London Avenue Canal were constructed atop earthen levees with an "I-wall" design consisting of steel sheet pilings driven into the compacted dirt atop the levee with reinforcing steel rods threaded through the top of the piling. Concrete was poured to encapsulate the top of the pilings and form the wall. The wall is composed of individual concrete slab sections (monoliths) that are linked together by rubbery gaskets (water stops) intended to prevent water from flowing between the monoliths and to allow the concrete to expand and contract.

62.

The entirety of the London Avenue Canal is constructed over beach sands of the Pine Island trend. The sands are located approximately 13 to 15 feet below the crown of the I-wall levees of the canal but are deeper in the vicinity where the northern breach occurred during Hurricane Katrina (station 113 to 118). The sand is covered with a veneer of peaty swamp deposits.

63.

Two key considerations in constructing an I-wall atop an earthen levee are 1) the composition of the soil into which the sheet piles will be driven and upon which the I-walls will rest and 2) the depth of the sheet piles based on the composition of the soil.

64.

Soil borings of the levee at the site of the London Avenue Canal south breach, which contributed to the catastrophe giving rise to this litigation, showed a layer of sand at a depth of 10 to 15 feet below sea level. Similar to the conditions at the south breach, soil borings of the levee at the site of London Avenue Canal north breach showed a layer of sand at a depth of 12 feet below sea level, as well as a layer of peat – a highly porous material that shrinks when dry and expands when wet, creating highly unstable soil conditions. Despite this layer of unstable sand, the sheet piles supporting the flood wall monoliths of the

London Avenue Canal were driven to a depth of 14 feet below sea level. ***Thus, the bottom of the sheet piles fell within a layer of sand.***

65.

As discussed *supra*, the flood walls along the London Avenue Canal are constructed with an "I-wall" design. The U.S. Army Corps of Engineers Manual on Engineering, Design and Construction of Levees dated April 30, 2000 states that, for stability reasons, flood walls utilizing the "I-wall" design rarely exceed seven (7) feet above ground surface and that an inverted "T-wall" design is used when walls higher than seven feet are required. ***Nonetheless, the flood walls at the breach sites of the London Avenue Canal, although built with an "I-wall" design, have concrete sections that rise to eleven (11) feet above ground surface.***

66.

Altogether, Defendants either failed to account for the soil and flood wall stability problems associated with the London Avenue Canal or proceeded with the engineering, design, and construction of the London Avenue Canal despite such problems. As the result of Defendants' combined negligence, the London Avenue Canal failed during Hurricane Katrina, flooding the surrounding area and causing extensive damage to Plaintiff's property.

FACTUAL BACKGROUND REGARDING THE ORLEANS AVENUE CANAL

67.

The Orleans Avenue Canal is a canal located in Orleans Parish and is connected on its north end to Lake Pontchartrain and on its south end with the SWB's Pumping Station No. 7. Figure 1 depicts the current location of the Orleans Avenue Canal.

68.

The levee and floodwall protection system along the Orleans Canal was incomplete at the time Hurricane Katrina struck the New Orleans area. Specifically, the embankment fronting the pump station, which is about four hundred feet long, is six feet lower than the floodwalls along the canal. That is, the floodwalls in this area are simply missing. As a result, the levee and floodwall protection system designed and constructed by Defendants was incomplete and did not provide adequate flood protection for the surrounding area, causing extensive water damage to Plaintiff's property.

FACTUAL BACKGROUND REGARDING HURRICANE KATRINA AND THE FAILURE OF THE 17th STREET, LONDON AVENUE, AND ORLEANS AVENUE CANALS

69.

Hurricane Katrina made landfall at 6:10 a.m. near Buras, Louisiana, on the morning of Monday, August 29, 2005, with estimated maximum winds of 117 mph.

70.

On August 29, 2005, a major breach of the 17th Street Canal occurred on the Orleans Parish side of the canal between 9:00 a.m. and 9:15 a.m. The breach rapidly scoured to depths below mean sea level, allowing lake and canal water to flow through the Orleans Parish bank of the canal well after the storm surge had subsided.

71.

The flooding as a result of the breach of the 17th Street Canal was totally catastrophic and caused extensive damage to Plaintiffs' property located at xxxxx xxxxx xxxxx, xxxxx, xxxxx, xxxxx.

72.

Upon information and belief, water began to enter the Gently area east of the London Avenue Canal between 7:00 and 8:00 a.m. on August 29,

2005, pouring through a 200-foot wide breach in the levee/flood wall on the east side of the London Avenue Canal, just north of the Mirabeau Avenue bridge. This breach is referred to as the "south breach" of the London Avenue Canal levee.

73.

The water from the south breach of the London Avenue Canal initially inundated the Gentilly area of New Orleans, an area bounded on the west by the London Avenue Canal, on the south by Gentilly Boulevard (the Metairie/Gentilly Ridge), on the east by the Inner Harbor Navigational Canal (the Industrial Canal) and on the north by Lake Pontchartrain. This water eventually combined with flood waters from other levee breaches, inundating other parts of New Orleans, including Plaintiffs' property located at xxx xxx xxx, New Orleans, Louisiana, 70112.

74.

Upon information and belief, water began to enter the Gentilly area west of the London Avenue Canal sometime before 9:00 a.m. on August 29, 2005, pouring through a 400-foot wide breach in the levee/flood wall on the west side of the London Avenue Canal, just south of the Robert E. Lee Bridge. This breach is referred to as the "north breach" of the London Avenue Canal levee.

75.

The water from the north breach of the London Avenue Canal initially inundated the Gentilly area of the city bounded on the west by Bayou St. John, on the north by Lake Pontchartrain, on the east by the London Avenue Canal, and along the southeastern side on a line drawn along Chef Menteur Highway to Gentilly Boulevard to Broad Street where it intersects with Orleans Avenue and then northwest along Orleans Avenue to Bayou St. John. This water eventually combined with flood waters from other levee breaches, inundating other parts of New Orleans, including Plaintiffs' property located at xxxxx xxxxx xxxxx, xxxxx, xxxxx, xxxxx.

76.

Upon information and belief, at approximately 9:00 a.m. on August 29, 2005, as a result of Defendants' inadequate design and construction of the floodwalls along the Orleans Avenue Canal, the embankment fronting the pump station at the foot of the canal was overtopped and left unprotected by missing floodwalls, causing significant water damage to the surrounding area.

77.

Notably, the storm surge associated with Hurricane Katrina did not overtop the flood walls at the sites of the 17th Street, London Avenue, and Orleans Avenue Canals. Indeed, the hurricane did not exceed

the designed parameters for these canals. Thus, none of the flood wall breaches in question would have occurred as a result of Hurricane Katrina alone. Rather, these breaches occurred solely as a result of Defendants' faulty and negligent engineering, design, construction, and maintenance of the 17th Street, London Avenue, and Orleans Avenue Canals.

FACTUAL BACKGROUND REGARDING THE IPET REPORT

78.

The Corps has conceded that the failure of the New Orleans levee system, including the failures of the 17th Street, London Avenue, and Orleans Avenue Canals, was caused by the inadequate design, planning, and construction of the system's levees and floodwalls. Following Hurricane Katrina, the Corps undertook a massive investigation of the reason for the levee and flood wall failures. This investigation was coordinated by the Interagency Performance Evaluation Taskforce ("IPET"). On March 26, 2007, IPET issued its Interim Final and Final Reports concerning the Performance Evaluation of the New Orleans and Southeast Louisiana Hurricane Protection System ("IPET Report").

79.

IPET was created by the Chief of Engineers, U.S. Army Corps of Engineers to evaluate the New Orleans hurricane protection system in light of Hurricane

Katrina. IPET consisted of government, academic, and private sector scientists and engineers with extensive experience in the field of civil engineering. The report was consistently peer reviewed before publication.

80.

The IPET Report provides extensive background regarding the construction of the hurricane protection system and reveals that, almost from the start, construction was based on inaccurate assumptions and calculations. IPET found that deficiencies existed throughout the levee system, which was constructed at an elevation below design specifications.

81.

Overall, IPET summed up its analysis of the hurricane protection system by acknowledging that its performance was compromised by the incompleteness of the system, the inconsistency in levels of protection, and the lack of redundancy. Volume I of the IPET Report made the following overall conclusions regarding the failure of the levees:

- Flood control structures in the region were authorized and designed relative to a water level datum(mean sea level), but constructed relative to a geodectic vertical datum ***incorrectly assumed to be equivalent to the water level datum. This decision resulted, in the case of***

the outfall canals, in structures built approximately 1 to 2 ft below the intended elevation.

- Sections of the system were build below specified design elevations due to the ***use of an inaccurate relationship between the geodectic datum and mean sea level datum.***

- Coupled with the ***use of average values*** obtained from widely spaced samples in a geology with highly variable conditions, the structure was left ***with a marginal factor of safety.***

- The structures were constructed on weak and compressible soils.

- The hurricane protection in New Orleans was designed and developed in a piecemeal fashion, resulting in inconsistent levels of protection.

- ***Four breaches***, all in the outfall canals and all involving I-walls, ***occurred before water levels reached the top of the floodwalls. All were caused by foundation failures*** induced by the formation of a gap along the canal side of the floodwall. . . . ***This failure mechanism***, in particular the gap formation, ***was not considered in the original design of the structures.***

- The maintained condition of the levees was an additional negative factor in the performance of the system.

FACTUAL BACKGROUND REGARDING THE MISSISSIPPI RIVER GULF OUTLET ("MR-GO") AND THE FUNNEL EFFECT OF THE MR-GO AND THE GULF INTRACOASTAL WATERWAY

82.

The Mississippi River Gulf Outlet ("MR-GO") was constructed in 1960 and exponentially enhanced the surge risk and likelihood for Greater New Orleans. The MR-GO was build by the Corps to provide shipping with a straight shot into the Gulf of Mexico, a 76-mile route that cuts 40 miles off the trip down the winding channel of the Mississippi River. In short, the MR-GO has devastated the protective marsh structures immediately east of New Orleans, and by ruining these adjacent marshes it has made its own levees that much more susceptible to erosion and failure. Moreover, the construction of the MR-GO has created a "funnel effect" that increases the local storm surge and poses a serious threat to public safety and an environmental threat to the region. figure 1 depicts the current location of the MR-GO.

83.

The Gulf Intracoastal Waterway ("GIWW") forms a protected shipping lane between Port Isabel, Texas (the Mexican border) and Apalachee Bay, Florida. The GIWW was a navigation canal project completed between New Orleans and Corpus Christi, Texas by mid-1942. The GIWW was officially completed in

June 1949. In 1944, under the authority of the Corps, the GIWW was rerouted to pass through the southern part of the IHNC, creating the first shallow channel through the wetlands that would facilitate propagation of hurricane surge from Lake Borgne into the heart of New Orleans. The Corps had negligently created the first part of a "Hurricane Alley" right into the heart of New Orleans. Figure 1 depicts the current location of the GIWW.

A. Illegal Failure of the Corps to Coordinate with State of Louisiana

84.

The Corps designed, constructed, operated and maintained the MR-GO according to faulty plans and specifications in violation of the River and Harbor Act of 1945, P.L. 79-14, 50 Stat. 10 (March 2, 1945) ("MR-GO Planning Law"), which reflected clear Congressional intent to involve the State of Louisiana (through its Governor or the governor's designee), as an "affected state," in investigation and planning. Congress also directed the Corps to "coordinate" its investigation and planning with the United States Department of Interior ("DOI"). The Corps failed to coordinate with and involve the Governor and the DOI and thus violated its duties and obligations established under the MR-GO Planning Law as well as the FWCA, *infra*.

B. Violation of Fish and Wildlife Coordination Act of 1934, as amended – Failure to Coordinate with Louisiana and Department of Interior and to do Required Study

85.

The Fish and Wildlife Coordination Act ("FWCA"), 16 U.S.C. § 662, as amended in 1956 and in 1958, also required coordination between any federal agency proposing to "impound," "divert," or "control" a waterway or body of water and the Fish and Wildlife Service. The MR-GO is such a waterway. The FWCA also required the Corps to consult with officials of the State of Louisiana and DOI during all phases of the MR-GO project, including investigation, planning and construction. The Corps was also directed therein to incorporate any of the observations or concerns raised by these state and federal agencies into any plans and specifications for the design and construction of the MR-GO. The Corps failed in its duties under said laws. In fact, a 1958 DOI report concluded that detailed investigations, coordinating hydrological, vegetative, fish and wildlife findings, as well as a model study, would be a prerequisite to predications of the MR-GO's effects and establishment of mitigatory measures. The report concluded further that "this project should be thoroughly investigated from the biological standpoint before construction through the marshes below Paris road and the Sound is undertaken." A four year regime of testing and study to assess the impact of the MR-GO was recommended. The Corps negligently, recklessly, wantonly,

and illegally proceeded to build the MR-GO without waiting for the completion of the essential four-year study requested by the DOI. The Corps knew or should have known that construction of the MR-GO through the wetlands from the GIWW to the Gulf would devastate Louisiana and its wetlands and result in the negligent, reckless, wanton or illegal destruction by the Corps of the best "speed-brake" and inhibitor to tidal surges.

C. Failure of the Corps to Follow MR-GO 1951 Authorization Report

86.

On September 25, 1951, the Corps submitted a report to Congress with its recommendations for construction of the MR-GO ("MR-GO Authorization Report"). This report contained a letter from the former Corps Chief of Engineers stating that the proposed MR-GO would be connected to the Industrial Canal by its own *separate* canal running parallel to the GIWW. Nonetheless, such a separate parallel canal was not built, and, instead, the Corps unilaterally deviated from the MR-GO Authorization Report by not digging a separate parallel canal to the IHNC/Industrial Canal. Rather, the Corps connected the MR-GO into the existing GIWW and significantly deepened and widened the GIWW from the point of connection to the IHNC/Industrial Canal, thus increasing vessel traffic and producing significantly increased hydrological consequences that were a

proximate cause of the flooding of Greater New Orleans.

D. Failure of Corps to Conduct Studies Recommended by its Own Board of Engineers

87.

The MR-GO Authorization Report also included a report from the Corps's Board of Engineers recommending further studies into the MR-GO's impact on the Louisiana coast and opined: "[t]he exact location of the outlet to the Gulf and the alignment of the seaway should be determined after more complete studies of sand movement, waive action, and local currents are made in cooperation with the Breach Erosion Board. Hence, if the improvement is authorized, ample provision should be made for modification of the location and alignment of the canal should further studies show that a more suitable location is available." No such studies were done, and, thus, the Corps did not consider alternatives that would have been less destructive to the lands and wetlands of Louisiana; such negligence, reckless, wanton or illegal acts or omissions were a proximate cause of the damages sustained by Plaintiffs.

E. Other Regulatory Violations by the Corps

88.

The Corps failed further to follow requirements of 33 CFR §§ 335-38, particularly 33 CFR § 336.1(c)(4) and

33 CFR § 320.4(b) and Executive Order 11990. The Corps deviated from and/or failed to execute its dredging activities (maintenance and operation of the MR-GO) in the manner required by the Corps pursuant to 33 CFR §§ 337.5 and 338.2. Furthermore, the Corps failed to follow requirements of the State of Louisiana (made applicable by 33 CFR § 337.2), including those contained in Chapter 7, Sections 701 and 707 of the Louisiana Administrative Code relating to dredging activities. In its actions and omissions set forth above, the Corps also violated several federal and state statutes implicated in the design, construction, maintenance and operation of the MR-GO, including the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(c); the Water Resources Development Act of 1990 (WRDA), 33 U.S.C. §§ 2316 and 2317; the Coastal Zone Management Act, 16 U.S.C. § 1452, *et seq.* and the Louisiana State and Local Coastal Resources Management Act, La. R.S. 49:214.21 *et seq.* Additionally, the Corps and its contractors (with the actual knowledge or under the direction of the Corps) illegally and improperly transported or otherwise disposed of dredge spoil, including, but not limited to, negligent and illegal placement of said spoil as spoil banks.

F. Illegal and/or Negligent Failure of the Corps to Follow Authorized Design, Route and Alignment

89.

After hearings, Congress authorized the construction of the MR-GO in 1956 (P.L.-455). The Corps unlawfully failed to follow the congressionally authorized design, route or alignment. The Corps also did not conduct required studies, consultation and coordination to mitigate adverse environmental impact to Louisiana in the destruction of highly productive estuarine water and marsh areas; nor did the Corps reduce or eliminate what would prove to be disastrous hydrological consequences to Greater New Orleans.

G. Failure of the Corps to Heed Multiple Warnings of Impending Disaster

90.

After the hurricanes of 1947 and 1965 (Betsy), the Corps knew or should have known of the hazards posed by the MR-GO and the effects of its negligent design, construction, operation and maintenance. Additionally, the Corps knew or should have known of the high probability of future damages likely to result from the inundation of Greater New Orleans. In recognition of the probability of further future damage to Greater New Orleans from the MR-GO project, the corps illegally and/or negligently (or through gross negligence, wanton and/or reckless acts

and/or omissions) failed to close the MR-GO, constructed control structures, and/or constructed levees, floodwalls, and other structures in a defective, negligent, sub-standard fashion; such "Levee" allegations are detailed separately herein.

91.

Virtually from inception of the planning and construction, the Corps received many warnings of impending disaster that would befall Greater New Orleans as a result of the negligent design, construction, operation and maintenance of the MR-GO and of the failure of the Corps to do timely what it should have done to eliminate or at least ameliorate the impending inundation of Greater New Orleans. Those warnings put the Corps repeatedly on notice of massive destruction to marshes, wetlands and other land and forest areas – all resulting from the negligent and/or faulty inspection, design, construction, operation and maintenance of the MR-GO.

H. Effect of the MR-GO on the GIWW During Hurricane Katrina

92.

During Hurricane Katrina, as the storm surge increased in intensity, an accelerated/enhanced hurricane surge was propelled up the MR-GO, rushing water within the MR-GO into the GIWW and causing certain levees and floodwalls of the GIWW to collapse, fail or become overtopped. This failure of the

GIWW's protection system was primarily due to the Corps's construction of the GIWW with porous, erodible lightweight "shell sand" fill or other inappropriate fill material not suitable for levee construction, especially without sheetpile cutoff, concrete, armoring or similar features to prevent erosion, undercutting, collapse or failure.

93.

As a proximate result of the negligent, grossly negligent, reckless, wanton and/or illegal acts or omissions of the Corps described herein, Plaintiffs sustained damages.

FACTUAL BACKGROUND REGARDING THE WEST BREACH OF THE INNER HARBOR NAVIGATIONAL CANAL ("INDUSTRIAL CANAL")

94.

Dredging of the Inner Harbor Navigation Canal ("Industrial Canal") began on June 6, 1918. Excavation work commenced with the construction of parallel dikes on either side of the canal. The more resistant clay materials that were excavated were dragged up onto the dikes and were gradually built up to become permanent protective levees. Figure 1 depicts the current location of the Industrial Canal.

95.

From the onset, contractors battled problems with slope stability when constructing the Industrial Canal, as the soft oozy soils constantly slid back into the excavation. Essentially, the levees and floodwalls along the Industrial Canal were built on a layer of organic marsh and peat with very soft clays. Fifteen feet below the top of the embankment is a layer of soft clay with silt and sand, which are very weak materials. The Corps was aware of these problems.

96.

The deficiencies in the construction of the Industrial Canal led to breaches on the west side of the canal during Hurricane Katrina where a three hundred-foot section of an I-wall failed at a railroad yard, and a seventy-foot section of levee comprised of a sandy "shell" fill was scoured and blew out, causing extensive damage to Plaintiffs' property.

97.

The City of New Orleans is the sole owner of the New Orleans Public Railroad Commission, a non-profit switching railroad that operates switches and terminal services for over 100 miles of track in New Orleans.

98.

On or about September 11, 2004, a New Orleans Public Railroad Train derailment caused a thirty-two and a half foot wide gap in Floodgate W-30, which is part of the floodwall system situated immediately west of the Industrial Canal.

99.

On December 14, 2004, PBR paid OLD $427,387.96, the full estimated cost of the reconstruction of Floodgate W-3. On information and belief, both PBR and OLD failed to assure these repairs were made before the August 2005 catastrophe giving rise to this action, resulting in extensive damage to Plaintiffs' property.

100.

Further, upon information and belief, CSX Corp. and/or CSX Inc. (collectively "CSX") designed and constructed a railroad crossing at or near the Industrial Canal's flood protection structures. In doing so, CSX utilized highly erodible, lightweight, and/or porous materials, including, but not limited to, "shell sand" and gravel, which caused CXS's structure to be significantly weaker than the surrounding flood protection structures. Upon information and belief, CSX also failed to install a "sheet pile cutoff" or similar device to prevent or limit erosion of its structure. Indeed, CSX could have prevented the failure of its structure at a minimal cost by installing concrete

"sheet pads" or other erosion protection devices at the base of the I-walls of the Industrial Canal.

101.

PNO has the full and exclusive right, jurisdiction, power and authority to govern the Port of New Orleans and is responsible for the maintenance of it wharves, terminals, marshaling yards, cranes, and all transportation and infrastructure affecting the regulation of commerce. The Industrial Canal is connected to the Port of New Orleans and is within the jurisdiction and control of PNO

102.

Upon information and belief, PNO never tested whether the design, construction, and/or maintenance of the structures of the Industrial Canal were adequate, proper, and compliant with the requisite standards. PNO's failure to ensure the adequacy of the design, composition, construction, and maintenance of the Industrial Canal's levees and floodwalls contributed to the breach of the Industrial Canal on the west side, which caused extensive damage to Plaintiffs' property.

FACTUAL BACKGROUND REGARDING THE "LAKE PONTCHARTRAIN, LOUISIANA AND VICINITY, HURRICANE PROTECTION PROJECT"

103.

The majority of the levee and/or I-wall structures surrounding the New Orleans metropolitan area were constructed, in part, under the authority of the "Lake Pontchartrain, Louisiana and Vicinity, Hurricane Protection Project" ("Lake Pontchartrain Project"). Congress first authorized the implementation of the Lake Pontchartrain Project in the Flood Control Act of 1965 to provide hurricane protection to the areas surrounding Lake Pontchartrain. The Corps was primarily responsible for the project's design and construction.

104.

The Corps based its design and construction of the Lake Pontchartrain Project on the 1959 Standard Project Hurricane, which the Corps knew to be obsolete by 1972 when the construction of the Lake Pontchartrain Project actually began. As a result, the Corps designed and constructed the levees and floodwalls associated with the Lake Pontchartrain Project based on outdated specifications, leaving the hurricane protection system deficient and subjecting the New Orleans area to an increased threat of flooding.

105.

Additionally, as discussed *supra*, the Corps rejected the congressionally authorized Barrier Plan that called for a series of levees and other flood control structures, including barriers and flood control gates, to prevent storm surges from entering Lake Pontchartrain in the event of a hurricane. The Barrier Plan was purposefully selected by Congress over another alternative, the High-Level Plan, which would have excluded the barriers and flood control gates called for by the Barrier Plan and replaced them with higher levees and flood protection structures along the lakefront and other areas. Congress rejected the High-Level Plan because it was seriously flawed in many respects, including, but not limited to, prolonged construction time, displacement of residences, less efficient floodwalls, a hampered interior drainage system, less protection to the Northshore, and increased cost.

106.

Despite Congress's approval of the Barrier Plan and rejection of the High-Level Plan, Defendants elected to implement the High-level Plan without obtaining the required authorization from Congress and knowing of the High-Level Plan's deficiencies.

107.

By the mid 1980's, as more residences were built along the canals, the Corps proposed to provide

greater protection from storm surge by implementing a parallel protection plan that called for raising the height of the existing levees and sheet pile floodwalls along each side of the canals. As discussed *supra*, Defendants implemented this parallel protection plan, electing to use I-walls rather than T-walls which would have provided a higher level of stability and reliability, especially, in soft soil conditions.

108.

On or about August 29, 2005, the I-walls designed and constructed by Defendants along the 17th Street Canal, London Avenue Canal, Orleans Avenue Canal, Industrial Canal, and the GIWW failed catastrophically due to Defendants' unauthorized, negligent, wanton and/or reckless, and unilateral decision to abandon the congressionally authorized Barrier Plan and implement the flawed parallel protection plan utilizing the I-wall design.

DAMAGES SUSTAINED BY PLAINTIFF

109.

Plaintiffs aver that, to date, they has sustained total damages in the amount of $750,000.00, as a direct and proximate result of the negligence and/or fault of the Defendants herein. Plaintiffs further aver that they continue to sustain damages as a direct and proximate result of the negligence and/or fault of the Defendants herein.

COUNT I:

NEGLIGENCE OF DEFENDANTS IN THE DREDGING OF THE 17TH STREET CANAL

110.

Plaintiffs repeat and re-allege the allegations in all preceding paragraphs as though fully set forth herein.

111.

The Corps, OLD, EJLD, and SWB had the legal responsibility and duty to Plaintiffs to cause, allow, and/or conduct the dredging of the 17th Street Canal in a manner that would not compromise the safety of the canal's levee/flood wall system. As discussed *supra*, the Corps, OLD, EJLD, and SWB ignored federal regulations and engineering standards and entirely disregarded overwhelming evidence that the dredging of the 17th Street Canal would dangerously compromise the canal's flood protection levee.

112.

As a result of the negligence of the Corps, OLD, EJLD, and SWB the dredging of the 17th Street Canal worsened the stability of the canal's levee and flood walls and eventually contributed to the failure of the canal during Hurricane Katrina, causing extensive damage to Plaintiffs. Defendants St. Paul and National Union, as the insurers of OLD and

EJLD, are directly liable to Plaintiffs for their damages.

113.

As a direct and proximate result of the negligence of the Corps, OLD, EJLD, and SWB in the dredging of the 17th Street Canal, Plaintiff suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT II:

NEGLIGENCE OF DEFENDANTS IN THE DESIGN, CONSTRUCTION AND MAINTENANCE OF THE 17TH STREET CANAL LEVEES AND FLOOD WALLS

114.

Plaintiffs repeat and re-allege the allegations in all preceding paragraphs as though fully set forth herein.

115.

The Corps, OLD, EJLD, and SWB had a legal responsibility and duty to Plaintiffs to cause, allow, and/or conduct the design and construction of the levees and flood walls of the 17th Street Canal in a manner that

would not compromise the safety of the canal's levee/flood wall system. As discussed *supra*, the Corps, OLD, EJLD, and SWB knew or should have known of the deficiencies in the design and construction of the 17th Street Canal, particularly given the nature of the soil in the area and the height and instability of the I-walls.

116.

The Corps, OLD, EJLD, and SWB negligently abandoned a congressionally authorized plan to install floodgates at the 17th Street Canal, which would have lessened the storm surge from Hurricane Katrina, Opting instead to use a "parallel" plan pursuant to which the 17th Street Canal levee and flood wall system was inadequately designed and built.

117.

The Corps, OLD, EJLD, and SWB negligently ignored multiple reports regarding the weak and unstable sand and soil below the 17th Street Canal and negligently designed and constructed the 17th Street Canal with I-walls built at 11 feet above ground, despite engineering guidelines discouraging the use of I-walls at heights greater than 7 feet above ground.

118.

The Corps, OLD, EJLD, and SWB negligently failed to maintain and inspect properly the 17th Street Canal levee/flood wall system, which would have led to the correction or exposure of its deficiencies such that the failure of the system could have been prevented.

119.

As a result of the negligence of the Corps, OLD, EJLD, and SWB, the design and construction of the 17th Street Canal worsened the stability of the canal's levee and flood walls and eventually contributed to the failure of the canal during Hurricane Katrina, causing extensive damage to Plaintiffs. Defendants St. Paul and National Union, as the insurers of OLD and EJLD, are directly liable to Plaintiffs for their damages.

120.

As a direct and proximate result of the negligence of the Corps, OLD, EJLD, and SWB in the design, construction, and maintenance of the 17th Street Canal, Plaintiffs suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT III:

NEGLIGENCE OF DEFENDANTS IN THE DESIGN, CONSTRUCTION, AND MAINTENANCE OF THE LONDON AVENUE CANAL LEVEES AND FLOODWALLS

121.

Plaintiffs repeat and re-allege the allegations in all preceding paragraphs as though fully set forth herein.

122.

The Corps, OLD, EJLD, and SWB had a legal responsibility and duty to Plaintiffs to cause, allow, and/or conduct the design and construction of the levees and flood walls of the London Avenue Canal in a manner that would not compromise the safety of the canal's levee/flood wall system. As discussed *supra*, the Corps, OLD, EJLD, and SWB knew or should have known of the deficiencies in the design and construction of the London Avenue Canal, particularly given the nature of the sand and soil in the area and the height and instability of the I-walls.

123.

The Corps, OLD, EJLD, and SWB negligently abandoned a congressionally authorized plan to install floodgates at the London Avenue Canal, which would have lessened the storm surge from Hurricane Katrina, opting instead to use a "parallel" plan pursuant to

which the London Avenue Canal levee and flood wall system was inadequately designed and built.

124.

The Corps, OLD, EJLD, and SWB negligently ignored multiple reports regarding the weak and unstable sand and soil below the London Avenue Canal and negligently designed and constructed the London Avenue Canal with I-walls built at 11 feet above ground, despite engineering guidelines discouraging the use of I-walls at heights greater than 7 feet above ground.

125.

The Corps, OLD, EJLD, and SWB negligently failed to maintain and inspect properly the London Avenue Canal levee/flood wall system which would have led to the correction of or exposure of its deficiencies such that the failure of the system could have been prevented.

126.

As a result of the negligence of the Corps, OLD, EJLD, and SWB, the design and construction of the London Avenue Canal worsened the stability of the canal's levee and flood walls and eventually contributed to the failure of the canal during Hurricane Katrina, causing extensive damage to Plaintiffs. Defendants St. Paul and National Union, as the

insurers of OLD and EJLD, are directly liable to Plaintiffs for their damages.

127.

As a direct and proximate result of the negligence of the Corps, OLD, EJLD, and SWB in the design, construction, and maintenance of the London Avenue Canal, Plaintiffs suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT IV:

NEGLIGENCE OF DEFENDANTS IN THE DESIGN, CONSTRUCTION, AND MAINTENANCE OF THE ORLEANS AVENUE CANAL LEVEES AND FLOODWALLS

128.

Plaintiffs repeat and re-allege the allegations in all preceding paragraphs as though fully set forth herein.

129.

The Corps, OLD, EJLD, and SWB had a legal responsibility and duty to Plaintiffs to cause, allow, and/or conduct the design and construction of the

levees and flood walls of the Orleans Avenue Canal in a manner that would not compromise the safety of the canal's levee/flood wall system. As discussed *supra*, the Corps, OLD, EJLD, and SWB knew or should have known of the deficiencies in the design and construction of the Orleans Avenue Canal, particularly given the embankment fronting the pump station at the foot of the canal that was left unprotected by missing floodwalls.

130.

As a result of the negligence of the Corps, OLD, EJLD, and SWB, the design and construction of the Orleans Avenue Canal failed to provide adequate flood protection to the surrounding area, causing extensive damage to Plaintiffs' property. Defendants St. Paul and National Union, as the insurers of OLD and EJLD, are directly liable to Plaintiffs for their damages.

131.

As a direct and proximate result of the negligence of the Corps, OLD, EJLD, and SWB in the design, construction, and maintenance of the Orleans Avenue Canal, Plaintiffs suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT V:

NEGLIGENCE OF THE CORPS IN THE DESIGN, CONSTRUCTION AND MAINTENANCE OF THE MR-GO

132.

Plaintiffs repeat and re-allege the allegations in all preceding paragraphs as though fully set forth herein.

133.

The Corps had a legal responsibility and duty to Plaintiffs to cause, allow, and/or conduct the design and construction of the MR-GO in a manner that would not compromise the safety of the New Orleans area. As discussed *supra*, the Corps knew or should have known of the deficiencies in the design and construction of the MR-GO.

134.

The Corp's negligence and/or fault in designing, engineering, inspecting and/or constructing the MR-GO, included, *inter alia*, without limitation (1) failing to take account of the waterway's inherent and known capability of serving as a funnel or conduit for rapidly accelerated, storm-driven surges which would magnify the storm surge's force against levees, flood walls, and spoil banks in New Orleans; and (2) failing to account for the devastation (through the construction itself as well as subsequent salt water intrusion

and accelerated erosion) of the wetlands, forests and land masses, thus, denuding and destroying a critical natural buffer against storm surge, and thereby further exacerbating the funnel effect created by the MR-GO's design.

135.

As a result of the negligence of the Corps, the MR-GO created a deadly funnel effect during Hurricane Katrina, exacerbating the storm surge and causing extensive damage to Plaintiff's property.

136.

As a direct and proximate result of the negligence of the Corps in the design, construction, and maintenance of the MR-GO, Plaintiffs suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT VI:

NEGLIGENCE IN THE DESIGN, CONSTRUCTION, AND MAINTENANCE OF THE GULF INTRACOASTAL WATERWAY

137.

Plaintiffs repeat and re-allege the allegations in all preceding paragraphs as though fully set forth herein.

138.

The Corps had a legal responsibility and duty to Plaintiffs to cause, allow, and/or conduct the design and construction of the GIWW in a manner that would not compromise the safety of the New Orleans area. As set forth herein. the Corps was negligent in the design, construction, and maintenance of the Hurricane Protection System around the GIWW in the following, non-exclusive, particulars: construction of the levees and floodwalls with porous, erodible lightweight "shell sand" fill, or other inappropriate fill material not suitable for levee construction, especially without sheetpile cutoff, concrete armoring or similar features to prevent erosion, undercutting, collapse or failure, or due to negligently inadequate height.

139.

As a result of the negligence of the Corps, the deficiencies in the levees and floodwalls of the GIWW

were exacerbated by the "funnel effect" created through the ship channels of the MR-GO, causing extensive damage to Plaintiffs' property.

140.

As a direct and proximate result of the negligence of the Corps in the design, construction, and maintenance of the GIWW, Plaintiffs suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT VII:

NEGLIGENCE OF DEFENDANTS IN THE DESIGN, CONSTRUCTION, AND MAINTENANCE OF THE INDUSTRIAL CANAL

141.

Plaintiffs repeat and re-allege the allegations in all preceding paragraphs as though fully set forth herein.

142.

The Corps, PNO, CSX, and PBR had a legal responsibility and duty to Plaintiffs to cause, allow, and/or conduct the design and construction of the

levees and flood walls of the Industrial Canal in a manner that would not compromise the safety of the canal's levee/flood wall system. As discussed *supra*, the Corps, PNO, CSX, and PBR knew or should have known of the deficiencies in the design, construction, and maintenance of the Industrial Canal.

143.

As a result of the negligence of the Corps, PNO, CSX, and PBR in the design, construction, and maintenance of the Industrial Canal, the Industrial Canal breached on the west side, causing damage to Plaintiffs' property.

144.

As a direct and proximate result of the negligence of the Corps, PNO, CSX, and PBR in the design, construction, and maintenance of the Industrial Canal, Plaintiffs suffered extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT VIII:

DEFENDANTS' NEGLIGENCE IN IMPLEMENTING THE "LAKE PONTCHARTRAIN, LOUISIANA AND VICINITY, HURRICANE PROTECTION PROJECT"

145.

Plaintiffs repeat and re-allege the allegations in all proceeding paragraphs as though fully set forth herein.

146.

The Corps, OLD, EJLD, SWB, St. Paul, and National Union had a responsibility and duty to Plaintiffs to cause, allow, and/or conduct the implementation of the Lake Pontchartrain Project in a manner that would not compromise the safety of the hurricane protection system. As discussed *supra*, the Corps, OLD, EJLD, SWB, St. Paul, and National Union knew or should have known of the deficiencies in the implementation of the Lake Pontchartrain Project as Defendants purposefully rejected the congressionally authorized Barrier Plan and instead implemented a parallel protection plan utilizing a flawed I-wall design.

147.

As a result of the negligence of the Corps, OLD, EJLD, SWB, St. Paul, and National Union, the 17th

Street Canal, London Avenue Canal, Orleans Avenue Canal, Industrial Canal, and the GIWW failed catastrophically, causing Plaintiffs to suffer extensive damage, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

COUNT IX:

STRICT LIABILITY

148.

Plaintiffs repeat and re-allege the allegations in all preceding paragraphs as though fully set forth herein.

149.

The Corps, OLD, EJLD, SWB, St. Paul, and National Union had, at all relevant times, the care, custody and control, and thus the *garde* of the 17th Street, London Avenue, and Orleans Canals and the levees/floodwalls adjacent thereto. As such those Defendants strictly liable to Plaintiffs for its damages resulting from the vices and/or defects within these canals and their levees/floodwalls, in accordance with Louisiana Civil Code article 2312, *et seq*.

150.

The Corps and PNO had, at all relevant times, the care, custody and control, and thus the *garde* of the Industrial Canal and the levees/floodwalls adjacent thereto. As such those Defendants are strictly liable to Plaintiff for its damages resulting from the vices and/or defects within the Industrial Canal and its levees/floodwalls, in accordance with Louisiana Civil Code article 2317, *et seq.*

151.

The Corps had, at all relevant times, the care, custody and control, and thus the *garde* of the MR-GO and the GIWW and the levees/floodwalls adjacent thereto. As such the Corps is strictly liable to Plaintiff for its damages resulting from the vices and/or defects within the MR-GO and the GIWW and their levees/floodwalls, in accordance with Louisiana Civil Code article 2317, *et seq.*

152.

Plaintiffs expressly plead the doctrine of *Res Ipsa Loquitur* against each and all of the Defendants, as may be appropriate under the circumstances and permitted by law.

COUNT X:

NUISANCE

153.

Plaintiffs repeat and re-allege the allegations in all preceding paragraphs as though fully set forth herein.

154.

As the proprietor of the 17th Street, London Avenue, and Orleans Avenue Canals, the Corps, OLD, EJLD, SWB, St. Paul, and National Union had a duty, pursuant to Louisiana Civil Code article 667, to refrain from creating a nuisance with respect to these canals. As the proprietor of the Industrial Canal, the corps and PNO had a duty, pursuant to Louisiana Civil Code article 667, to refrain from creating a nuisance with respect to this canal. As the proprietor of the MR-GO and the GIWW, the Corps had a duty, pursuant to Louisiana Civil Code article 667, to refrain from creating a nuisance with respect to these canals. Because of Defendants' negligence, however, Plaintiffs have been deprived from the use and enjoyment of this property. Thus, Defendants have created a nuisance by ignoring the hazardous conditions in the hurricane protection system.

155.

Defendants have violated the federal common law doctrine of nuisance. The negligent and/or reckless actions of Defendants in creating and ignoring the

hazardous conditions in the hurricane protection system have caused unique and significant harm to Plaintiffs as discussed *supra* and have deprived Plaintiffs from the use and enjoyment of their property. Thus, Defendants are liable for Plaintiffs' damages, including, but not limited to, loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that:

(1) The Corps, OLD, EJLD, SWB, St. Paul, and National Union be held liable for all of Plaintiffs' damages caused by their negligence in the dredging of the 17th Street Canal, including, but not limited to, Plaintiffs' loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(2) The Corps, OLD, EJLD, SWB, St. Paul, and National Union be held liable for all of Plaintiffs' damages caused by their negligence in the design, construction, and maintenance of the 17th Street Canal, including, but not limited to, Plaintiffs' loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress,

attorneys' fees, and other special damages to be proven at trial;

(3) The Corps, OLD, EJLD, SWB, St. Paul, and National Union be held liable for all of Plaintiffs' damages caused by their negligence in the design, construction, and maintenance of the London Avenue Canal, including, but not limited to, Plaintiffs' loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(4) The Corps, OLD, EJLD, SWB, St. Paul, and National Union be held liable for all of Plaintiffs' damages caused by Defendants' negligence in the design, construction, and maintenance of the Orleans Avenue Canal, including, but not limited to, Plaintiffs' loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(5) The Corps be held liable for all of Plaintiffs' damages caused by its negligence in the design, construction, and maintenance of the MR-GO, including, but not limited to, Plaintiffs' loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(6) The Corps be held liable for all of Plaintiffs' damages caused by its negligence in the design, construction, and maintenance of the GIWW, including, but not limited to, Plaintiffs' loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(7) The Corps, CSX, PBR and PNO be held liable for all of Plaintiffs' damages caused by their negligence in the design, construction, and maintenance of the Industrial Canal, including, but not limited to, Plaintiffs' loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(8) The Corps, OLD, EJLD, SWB, St. Paul, and National Union be held liable for all of Plaintiffs' damages caused by Defendants' negligence in the implementation of the Lake Pontchartrain Project, including, but not limited to, Plaintiffs' loss of property (both immovable and movable), diminution of property value, evacuation expenses, additional living expenses, mental anguish, emotional distress, attorneys' fees, and other special damages to be proven at trial;

(9) Defendants be held strictly liable for Plaintiffs' damages resulting from the vices and/or defects within all canals and their levees/floodwalls, in

accordance with Louisiana Civil Code article 2317, *et seq.* and the doctrine of *Res Ipsa Loquitur*;

(10) Defendants be held liable for Plaintiffs' damages resulting from Defendants' creation of a nuisance in creating and ignoring the hazardous conditions of the hurricane protection system;

(11) Defendants be held liable for all Plaintiffs' attorneys' fees and costs associated with this litigation pursuant to the Federal Tort Claims Act and/or the Equal Access to Judgments Act;

(12) Defendants be held liable for all pre-judgment and post-judgment interest on all amounts awarded to Plaintiffs; and

(13) Any other equitable and general relief in the nature of this case will allow.

Respectfully submitted,

/s/ Martha Y. Curtis

MARTHA Y. CURTIS,
#20446 [/s/ T.A.]
SHARONDA R. WILLIAMS
#28809
SHER GARNER CAHILL RICHTER KLEIN & HILBERT, L.L.C.
909 Poydras Street, 27th Floor
New Orleans, Louisiana 70112
Telephone: (504) 299-2100
Facsimile: (504) 299-2300
ATTORNEYS FOR PLAINTIFFS

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 06-9763 DIVISION "L" SECTION "6"

LISA RODRIGUEZ, ANTHONY RUSSO, CURTIS AMANN, and LAURA AMANN

VERSUS

SEWERAGE AND WATER BOARD OF NEW ORLEANS, BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE DISTRICT, THE CITY OF NEW ORLEANS, THE LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, and THE BOARD OF COMMISSIONERS FOR THE PORT OF NEW ORLEANS

FILED: _____ _____
DEPUTY CLERK

ORDER OF RECUSAL

(Filed Jun. 30, 2008)

In accordance with Louisiana laws regarding recusal of a judge, Louisiana Code of Civil Procedure Article's 151(B) and 152(A), and in an abundance of caution, I hereby recuse myself from the above numbered and captioned case. I live in the defined footprint of this action. Living in the defined footprint of this action could make me a putative class member.

IT IS ORDERED that the Clerk of Civil District Court for the Parish of Orleans is directed to re-allot

this matter, in its entirety, to another of this court, thus omitting Division "L".

New Orleans, LA., this 30th day of ~~July~~ [June], 2008.

/s/ Kern A. Reese
JUDGE KERN A. REESE
DIVISION "L"

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2005-11660 DIVISION L SECTION 11

SUSAN and WILLIAM LAURENDINE ET AL

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE BOARD

JUDGMENT

This matter came for hearing on the 5th day of December, 2008 on defendant's, Sewerage and Water Board, Motion to Recuse the Honorable Judge Kern Reese.

PRESENT: DARLEEN JACOBS, Attorney for plaintiffs, SUSAN and WILLIAM LAURENDINE, AL LEBOUEF, ALINE HODGES, PIERRE ASCANI, THERESA HARVEY, DALE ATKINS and ANITA SARRAT;

CHARLES LANIER, Attorney for the defendant, SEWERAGE AND WATER BOARD

After hearing the pleadings, evidence and argument of counsel;

IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Recuse Judge Reese is hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of Court re-allot this matter, excluding Division "L".

JUDGMENT SIGNED, NEW ORLEANS, LOUISIANA this 13th day of January, 2009.

/s/ RMG
JUDGE ROBIN M. GIARRUSSO
DIVISION G

A TRUE COPY
/s/ M McKay
DEPUTY CLERK
CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2005-11660 DIVISION L SECTION 11

SUSAN and WILLIAM LAURENDINE ET AL

VERSUS

THE BOARD OF COMMISSIONERS FOR THE ORLEANS LEVEE BOARD

REASONS FOR JUDGMENT

Under the recent revision to La.CCP art. 151, this Court has no choice. Judge Reese must be recused as he and his family members are putative class members to this litigation. This Court is constrained to follow the mandatory language of the article despite this Court's belief that Judge Reese is a fair and impartial jurist.

SIGNED, NEW ORLEANS, LOUISIANA this 13th day of January, 2009.

/s/ RMG
JUDGE ROBIN M. GIARRUSSO
DIVISION G

A TRUE COPY
/s/ M McKay
DEPUTY CLERK
CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 05-11660 DIVISION "L" SECTION: 06

SUSAN AND WILLIAM LAURENDINE, ET AL.

VERSUS

THE BOARD OF COMMISSIONERS
FOR THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS, ET AL.

FILED: _____ _____
DEPUTY CLERK

**MOTION AND ORDER FIXING TIME
FOR FILING APPLICATION
FOR SUPERVISORY WRIT**

On MOTION of SUSAN LAURENDINE, ET AL, and their counsel, DARLEEN JACOBS, and on suggesting to the Court that:

1. Plaintiffs intend to apply to the Fourth Circuit Court of Appeal, State of Louisiana, for Supervisory Writs in the above entitled and numbered cause;

2. It is necessary that this Honorable Court fix a reasonable time in which plaintiffs may file said application in the Fourth Circuit Court of Appeal, not

to exceed thirty (30) days from the date of the JANUARY 13, 2009 Judgment.

Respectfully submitted,

/s/ Darleen M. Jacobs
DARLEEN M. JACOBS,
bar # 7208
823 ST. LOUIS STREET
NEW ORLEANS, LOUISIANA
70112
(504) 522-3287 & 522-0155

Counsel for Plaintiffs
SUSAN LAURENDINE, ET AL.

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 05-11660 DIVISION "L" SECTION: 06

SUSAN AND WILLIAM LAURENDINE, ET AL.

VERSUS

THE BOARD OF COMMISSIONERS
FOR THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS, ET AL.

FILED: _____ _____
DEPUTY CLERK

ORDER

IT IS ORDERED that plaintiffs' application for supervisory writs in the above entitled and numbered cause be filed in the Fourth Circuit Court of Appeal, State of Louisiana, on or before, the _____ day of _____, 2009.

This _____ day of _____, 2009, at NEW ORLEANS, Louisiana.

_____
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleadings have been served upon all counsel of record by depositing the same in the U.S. Mail,

postage prepaid and properly addressed, this 2nd day of February, 2009.

Darleen Jacobs
DARLEEN JACOBS

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 05-11660 DIVISION "L" SECTION: 06

SUSAN AND WILLIAM LAURENDINE, ET AL.

VERSUS

THE BOARD OF COMMISSIONERS
FOR THE ORLEANS LEVEE DISTRICT,
PARISH OF ORLEANS, ET AL.

FILED: _____ _____
DEPUTY CLERK

NOTICE OF INTENT TO
APPLY FOR SUPERVISORY WRIT

To: The Honorable ROBIN GIARRUSSO, Judge, Division "G", Civil District Court for the Parish of Orleans, and counsel:

Charles Lanier, Esq.
601 Poydras Street, Suite 2300
New Orleans, La. 70130-6023

Thomas Anzelmo, Esq.
Mark Hanna, Esq.
Kyle Kirsch, Esq.
Andre Lagarde, Esq.
3445 N. Causeway Blvd., Suite 800
Metairie, Louisiana 70002

James Pate, Esq.
Ben Mayeaux, Esq.
One Petroleum Center, SUITE 200
1001 West Pinhook Road
Lafayette, Louisiana 70503

Timothy Hassinger, Esq.
701 Poydras Street, Suite 4040
New Orleans, Louisiana 70139

In accordance with Rule 4.2, Uniform Rules, Courts of Appeal, you are hereby notified of plaintiffs intention to apply to the Fourth Circuit Court of Appeal for Supervisory Writ from the judgment of the Civil District Court for the Parish of Orleans, rendered in the above captioned matter on the 13th day of JANUARY, 2009, with respect to the Court's grant of Sewerage and Water Board's motion to recuse the Honorable Kern Reese.

Respectfully submitted,

/s/ Darleen M. Jacobs
DARLEEN M. JACOBS,
bar # 7208
823 ST. LOUIS STREET
NEW ORLEANS,
LOUISIANA 70112
(504) 522-3287 & 522-0155

Counsel for Plaintiffs
SUSAN LAURENDINE, ET AL.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleadings have been served upon all counsel of record by depositing another copy in the U.S. Mail,

postage prepaid and properly addressed, this 2nd day of February, 2009.

/s/ Darleen Jacobs
DARLEEN JACOBS